Nos. 80-1339

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

THOMAS L. CLANON, Superintendent of the California Medical Facility at Vacaville,
Petitioner,

vs.

EARL B. GIBSON,
Respondent.

GEORGE SUMNER, Superintendent of the Correctional Training Facility at Soledad,
Petitioner,

vs.

LAWRENCE JUSTICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Whether, in a state criminal trial, the attempt by certain jurors to gather isolated data of marginal relevance requires the setting aside of the convictions, despite overwhelming evidence of guilt.

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IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1980

THOMAS L. CLANON, SUPERINTENDENT OF THE CALIFORNIA MEDICAL FACILITY AT VACAVILLE

Petitioner,

vs.

EARL B. GIBSON,

Respondent.

GEORGE SUMNER, SUPERINTENDENT OF THE CORRECTIONAL TRAINING FACILITY AT SOLEDAD,

Petitioner,

vs.

LAWRENCE JUSTICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, Thomas Clanon and George Sumner, superintendents of correctional facilities in California, respectfully pray that a writ of certiorari issue in this

case to review the judgment of the United States Court of Appeals for the Ninth Circuit, which judgment was entered on December 8, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit appears as Appendix A to this petition and may be found at 633 F.2d 851. The opinion of the United States District Court for the Northern District of California appears as Appendix B. The opinion of the California Court of Appeal, First Appellate District, Division One, appears as Appendix C.

JURISDICTION

Jurisidiction is conferred upon this Court by Title 28, United States Code, section 1254(1). This petition is filed within 60 days of the rendition of judgment by the court of appeals.

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CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV, section 1: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

A. State Court Proceedings

On November 16, 1971, the Marin County Grand Jury indicted respondents Earl B. Gibson and Lawrence Justice for the following violations of the applicable provisions of the California Penal Code: (1) murder, in violation of section 187 (both appellants); (2) assault upon a non-inmate by one serving a life sentence, in violation of section 4500 (Gibson); (3) assault by one serving less than a life sentence, in violation of section 4501 (Justice); (4) a second violation of section 4500 by Gibson; (5) a second violation of section 4501 by Justice. The indictment further alleged that Gibson

had suffered one prior felony conviction and that Justice had suffered three prior felony convictions (CT 1-4).[1/]

After numerous pretrial motions (CT 6-300), the cause came on for trial by jury on December 12, 1972 (CT 309). On April 18, 1973, the jury found respondents guilty of all charges against them (CT 464-465, 466, 467).

On June 22, 1973, respondent's motion for probation was denied and they were sentenced to state prison for one count of murder of the first degree. Sentence was stayed on the other counts (CT 579-580).

The California Court of Appeal, First Appellate District, Division One, affirmed the judgments of conviction on November 14, 1975 (Exh. C). The California Supreme Court denied respondent's petition

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1. "CT" refers to the Clerk's Transcript of the trial in state court.

for hearing on January 21, 1976. This Court denied a petition for writ of certiorari on June 7, 1976 (No. 75-6608).

B. Federal Court Proceedings

Respondents filed a petition for writ of habeas corpus on June 2, 1976 (R 1-6).[2/] After full briefing and argument, the petition for writ of habeas corpus was denied on February 15, 1977 (R 151-168). Appeal to the Ninth Circuit followed.

On December 8, 1980, the Ninth Circuit reversed the order denying the writ of habeas corpus, and ordered that the writ be granted unless the State of California elects to grant a new trial within 60 days. 633 F.2d at 855.

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2. "R" refers to the Record which has been designated and prepared in the federal proceedings in this case.

STATEMENT OF THE FACTS

A. The crimes

The opinion of the California Court of Appeal provides a full and fair statement of the relevant facts. We quote from the court's opinion (App. C, pp. 2-12).

> "Herman Johnson, an inmate in San Quentin Prison, testified that Gibson had accused him of being a witness in a case involving the murder of a correctional officer at Soledad Prison. Johnson denied the accusation, but notwithstanding his denial, Gibson told him on two occasions that he was going to 'get hit.'
>
> "On July 19, 1971, Johnson encountered Gibson and Justice at the foot of a flight of stairs. Johnson was stabbed in the neck by Gibson and was taken to the prison hospital. On the following day

Gibson went to football practice. He complained of an injury to his back and was taken to the prison hospital. Gibson was examined the next morning by a doctor who determined that there was no external evidence of injury and authorized his release from the hospital.

"Johnson had been assigned to room 202 on the second floor of the prison hospital. For security purposes Officer Leo Davis was placed in front of the door to Johnson's room. Johnson testified that on July 21, 1971, at around noon, he heard a 'scuffling' sound outside his door. The door to his room, which was locked, had a small window and a food tray 'porthole.' Johnson observed Gibson, Justice and a third person whom he described as a tall

black man who wore his hair in a large natural. The three men were dressed in jail blues, and Gibson wore a blue wool cap. Johnson observed the unidentified man holding Officer Davis around the neck while Gibson and Justice struck him. Johnson stated that at one point he saw Justice pass a knife to the unidentified man who then hit the officer. Johnson heard a whistle blow softly and then heard someone say, 'He don't have the key.'

"Ivan Kranzelic, an inmate on the fourth floor of the prison hospital, testified to certain events which he claimed to have observed immediately preceding and following the attack on Officer Davis. Although he acknowledged

that he had received morphine for pain, he denied sleeping. He stated that on the day of the attack, at about 8:30 a.m., a man known as 'Choice' brought Gibson a pair of pajamas. 'Choice' left and returned about 20 minutes later at which time Ricardo Cooper, 'Monky D' Palmer and an unidentified tall black man were present. At about 10:00 a.m., Dr. Erickson examined Gibson and when he left Gibson inquired of Palmer, '"Monky D," did you brought that things in?' When Palmer stated that he had Gibson said, 'We have to do it today, doctor might put me in a cast.' Gibson, 'Choice,' Cooper and the tall black man went into the washroom. When they came out Kranzelic observed Gibson changing into a blue shirt and blue pants and

observed Palmer hand a 'shank' to Gibson, which 'Choice' then placed between a bunch of pajamas. Gibson asked Cooper how he could pass by Miss Baldwin and Cooper said he would take care of that. Cooper took Kranzelic's crutches, telling him they were for Gibson. Cooper, Gibson and 'Choice' left the room. A few minutes later Palmer left.

"About 20 minutes later, Cooper, Gibson and 'Choice' returned. They were walking rapidly. They went into the kitchen and Kranzelic heard water running. The three men and Palmer, who had been in the kitchen, came out of the kitchen and went to Gibson's bed. Gibson asked 'Mike', who was standing in front of the kitchen, if the cops were coming. Gibson was

wearing a T-shirt. It had a blood spot on the side. Gibson took his clothes off and put them in his night locker, which he pushed to the end of the room near the last bed. Gibson brought the locker from that bed to his bed. He took something wrapped in paper from under the blanket of his bed and handed it to 'Robert' telling him to get rid of it. Robert threw it out of the window. Gibson handed his T-shirt to Cooper who went in the washroom. Kranzelic heard a tearing sound and a flushing of the toilet.

"Kranzelic testified further that 'Choice' came out of the kitchen area holding his hand and some paper. He went to Gibson's bed and threw the paper in a garbage can. Palmer threw a roll of toilet

paper with blood spots on it in the same garbage can. Cooper wore a lab coat under which he hid an object that looked like a screw driver. Gibson put on a new pair of pajamas. A few minutes later an officer came in and arrested Gibson.

"Kranzelic described 'Choice' as being five feet four inches tall, between 22 and 24 years of age, with long messy hair. He stated that 'Choice' was a weight lifter and that he walked with a limp. At a pretrial hearing Kranzelic identified a photograph of defendant Justice as the person he knew as 'Choice.' At the grand jury hearing Kranzelic could not identify a photograh of Justice.

"Wayne Clark, a correctional officer, searched the fourth floor

of the prison hospital for evidence. He found a roll of toilet paper with red stains on it in a trash can.

"Charles Johnson, an inmate, testified for the prosecution. He stated that on July 21, 1971, at about 11:45 a.m., he went to visit a patient in the room next to that occupied by Herman Johnson on the second floor of the prison hospital. Officer Davis, who was guarding Herman Johnson's room, asked Charles Johnson to summon an attendant. As Charles Johnson went around the corner he saw Gibson, Justice and Reginald Muldrew in the shower room. Charles Johnson summoned inmate Kajor, a hospital attendant, from the nurse's station and accompanied him back to Herman Johnson's room. He noticed that Gibson, Justice and

Muldrew were still in the shower room.

"Charles Johnson visited the patient in the room next to that of Herman Johnson and then went down to the first floor. While there he heard the panic buzzer and upon hearing the officers say 'second floor' he went upstairs to the second floor where he observed Justice and Muldrew. Justice asked Charles Johnson what had happened and Johnson replied that he didn't know. A nurse told Charles Johnson to proceed downstairs. While on the first floor Charles Johnson observed that both Justice and Muldrew were there. Justice was permitted to go through the center grille gate.

"Officer George Randolph escorted Justice out of the clinic

door. Officer Randolph noticed that Justice had something in his right hand. When he asked Justice to open his hand Justice glared at him but complied, revealing blood-stained tissue paper and a deep cut between the thumb and forefinder. Officer Ayres also observed that one of Justice's hands was closed around some paper.

"Justice's hand was examined by Arthur Simon, a medical technical assistant, at about 2:25 p.m. He observed three incise wounds on the palm, which he described as superficial and of the type resulting from a cut by a knife, razor or piece of glass. Simon testified that in his opinion the wounds were fresh, possibly two or three hours old, but that it was possible that they were a few days old.

"A white-over-brown rubber shower thong was found near room 202, occupied by Herman Johnson. A similar thong was found in room 224. The first was a left thong and the second a right thong. Officer Ayres testified that Justice customarily wore a pair of rubber shower thongs while in the hospital and that these were white on the top and brown on the bottom. When Justice was taken from the hopsital about 30 to 45 minutes after the attack on Officer Davis, he was wearing green and white thongs of a different shape than the ones he customarily wore.

"Ellis Baker, an employee of the Department of Corrections who participated in the search of the second floor of the hospital, observed a knife on the roofwell

from the window in room 226. When retrieved, the knife, which had a wooden handle and some tape next to the handle and the blade, had red faded stains on the tape and blade. In room 224 bloodstains were discovered on the bedsheets. A blue shirt, blue pants and a pile of freshly laundered pajamas were found under the bed in room 224. A rubber shower thong was found in the pile of pajamas. Some of the pajamas had bloodstains, as did the blue shirt and the blue pants. There were bloodstains on the sink by the door and on the bed. The bloodstains on the sink appeared to be fresh. There were smudged fingerprints on the window panes. Fingerprints were also found on the knife, but they could not be identified.

"It was stipulated that Officer Davis died of knife wounds. Davis received nine wounds, all of which were consistent with having been inflicted by a single weapon.

"Records of the Alameda-Contra Costa Medical Association Blood Bank were introduced into evidence. These disclosed that Officer Davis' blood type was 'O.' Blood samples were taken from Gibson and Justice pursuant to search warrants and the results were admitted into evidence. Gibson's blood type is 'O' and that of Justice is type 'AB.'

"Louis Maucieri, a criminalist employed by the Department of Justice, was permitted to testify as an expert, over defense objections as to his qualifications. He testified that 'AB' type blood was

found on the knife, on a pair of denim pants found in room 224, on a roll of toilet paper found in a fourth floor trash can, on a white jacket found in the fourth floor soiled linen hamper, and on Gibson's bedding."

B. Facts relevant to respondents' contentions on federal habeas corpus

1. Juror Grist: Type AB blood and its rarity.

This description is taken from those affidavits filed by various jury members (RT 492-493, 540-560, 563-564)[3/] and admitted into evidence at the hearing on respondent's motion for new trial. Necessarily, the description is limited to whatever evidence of "statements made, or conduct, conditions, or events occurring either within or without

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3. "RT" refers to the Reporter's Transcript of the trial in state court.

the jury room, of such a character as is likely to have influenced the verdict improperly . . ." appears in them. People v. Hutchinson, 71 Cal.2d 342, 349-350 (1969). By the same token, "evidence of the jurors' subjective attitudes or reactions to statements or conduct or the mental processes by which the verdict was reached" is excluded. Id.

Juror Grist admitted researching in an enclyclopedia the fact that AB was a rare blood type. No other jurors made statements about the subject to him. He believed he may have mentioned the fact of rarity to another juror. Most importlantly, he believed the research was done after the jury had finished balloting as to appellant Justice (CT 543-544).[4/] Juror Chapman confirmed that juror

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4. Juror Cox, who did not recall the identity of the juror making the statement, thought the statement had been made before balloting began (CT 552).

Grist had made the statement in an offhand manner and while other conversations were in progress (CT 542). Foreman Lubersky did not recall the comment (CT 548).[5/] Juror Taylor did not hear the statement (RT 551). Juror Storey did not remember such a statement (RT 555). In any event, she was already aware of the rarity (CT 555). Juror Michael did not recall such a statement (CT 558). Nor did juror O'Brien (CT 558). She also took it to be common knowledge that AB was a rare blood type (CT 559-560). Juror Mraz did not remember the statement. Although she had donated

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5. Juror Cox's recollection was that Lubersky had immediately voiced a warning against considering the evidence (CT 553). Juror Gauger's recollection paralleled that of juror Cox as to foreman Lubersky's action (CT 546).

A similar caution was given by juror Storey, as an accompaniment to her own statement that AB blood was rare (CT 555). This statement was heard by juror Michael, who later remarked she would reach her verdict independent of such knowledge (CT 558).

Another admonition was apparently given by juror Bradford, who was not otherwise heard from (CT 546).

blood and knew AB was a rare blood type, she refrained from consulting her donor's card (CT 564).

Of the nine juror polled, then, only four recalled the precise statement of which appellants complained. Two were aware of an immediate admonition from the foreman that such evidence should not be considered. The comment is best described as a momentary one.

2. Juror Gauger: Morphine dosage and perception.

In her original affidavit, submitted with the defense motion for new trial, juror Gauger said she consulted a medical encyclopedia at the request of her fellow jurors, and therein confirmed what she had previously thought to be true, that the dosage of morphine received by Ivan Kranzelic was not heavy enough to have affected his perception. She related same to the jury during deliberations (CT 492-493). In her subsequent

affidavit, attached to the prosecution opposition, she made several qualifying statements. It turned out she had raised the point during deliberations, and speculated as to its effect. Other jurors offhandedly said she should be sure, an admonition which she took as a request to look up the matter. She remembered also that someone commented the jury should not consider the effect of the dosage, in that there had been no evidence presented on the point.

Juror Chapman did not recall generally what Gauger had said. He recalled that he and possibly another juror had immediately remarked the matter should not be considered. Other jurors nodded assent, and the issue was thereafter dropped (CT 541-542). Juror Grist agreed that no one had requested the information. He did not remember the substance of juror Gauger's comment, which had been in the nature of a passing

remark (CT 543). Foreman Lubersky recalled the substance of Gauger's remark. He further recalled the statement was of momentary duration, and was not thereafter discussed. No one requested the information. Lubersky did not recall subsequent deliberations concerning Ivan Kranzelic's ability to perceive (CT 548). The foreman might have admonished the jury, at the time juror Gauger made her remark, not to consider that about which no evidence had been presented (CT 549). Juror Taylor heard the unsolicited remark, then heard two jurors (one of them juror Chapman) say the matter should not be considered. The matter was dropped (CT 550-551). Juror Cox recalled the statement being made, but her version is neutral, however, as she attributed to juror Gauger the assertion that Kranzelic's perception could have been sharpened or dulled (CT 552). Juror Storey said the comments were unsolicited. They

were neutral in import, a fact she herself immediately commented upon. Foreman Lubersky commented that they could not consider the issue. The comment was made to a small group of the jurors, including Storey and Lubersky. No more was heard of the matter (CY 554-555). Juror Michael characterized the statement as a passing remark. She was not even sure everyone heard the remark, as it had been made in the foreman's vicinity. He had delivered a prompt admonition (CT 557). Juror O'Brien, seated at the other end of the table, did not recall any discussion (RT 559). Juror Mraz, seated near Gauger, had recollection similar to those of juror Michael (CT 563-564).

The offhand statement thus was made only to a small segment of the jury. Prompt admonitions that the

in it being dropped. The "research" had not been requested by other jury members.

3. The evidentiary importance of the matters raised.

(a) The rarity of type AB blood

Evidence of the incidence of type AB blood was a type of evidence whose reliability is unquestionable. It is simply not open to doubt that AB is a rare blood type.[6/] That a jury should receive evidence of a common and well-accepted point is surely a different matter than that they should consider a more obscure point.

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6. Respondents attempted to argue they were deprived of the right to cross-examine on the issue of exactly how rare the blood type was. But juror Grist only remarked that the type was rare. It would not matter whether the source consulted was within one percentage point, or two or three either way of another source; in any event, the type would be classed as "rare." That source of cross-examination or rebuttal simply was not available.

Respondents asserted that evi-evidence of rarity was at the heart of the prosecution case, the prosecutor going so far as to label it respondent Justice's "calling card" (RT 6589-6590, 6592, 6627-6628). They also contend it provided physical corroboration of respondent Justice's presence, hence of Herman Johnson's testimony. Each source of importance is subject to doubt upon closer scrutiny. As to the prosecutor's language, that argument depends on the willingness of the jury to infer that the AB blood on the knife and Justice's AB blood were the same. The argument can be advanced without the rarity aspect. Rarity, in effect, only provides an even greater reason why respondent Justice could not be <u>excluded</u> as the killer. Similarly, blood on the knife did little to corroborate Herman

Johnson's account of the killing. The knowledge that respondent Justice's blood and the knife blood were of the same type would have corroborative effect only when several intervening inferences were made - that the knife was the murder weapon, for example. It is difficult to see what added corroboration would result from knowing the blood type was rare. That assertion loses sight of the truly damning corroborative factors - the recovered thongs and later wearing of new ones, the cuts only on appellant Justice's hands, the obvious limp. The upshot is that evidence of rarity was not at the logical heart of the case as presented. It would simply have made the inferences the prosecution asked the jury to draw more attractive, hence the prosecutor's preference for it.

One source of cross-examination deprivation claimed by respondents has

been considered [fn. 6, ante]. The other cited by them is that they could have cross-examined to show the prison hospital population had a different incidence of type AB blood than did the general population. That assertion overlooks the evidence that only respondent Justice was seen to have a cut on the hand. All the others, when checked, had no wounds. Hence, the relative incidence of type AB blood in the prison hospital was of secondary importance, not a subject for proper cross-examination or rebuttal.

To recapitulate: the sources of cross-examination deprivation are of niggardly import; the evidence of rarity of type AB blood was not evidence at the logical heart of the prosecution case; and the evidence learned by the jury was not open to serious doubt as to its

correctness. These evidentiary factors, each and together, suggest an innocuousness to the first jury "misconduct" incident above that already apparent from the jurors' descriptions of what occurred. Because the evidence was so commonly accepted as to its correctness, there is not the danger of the jury rendering a decision predicated on a falsehood. Because the evidence was not crucial, there is no reason to suspect it influenced the deliberations. And because there were no true avenues of cross-examination or rebuttal foreclosed, there is no reason to suspect any denial of confrontation in fact occurred.

(b) The Morphine Dosage and Perception

The most telling evidentiary consideration concerning the morphine

and perception is the context in which it arose at trial. Ivan Kranzelic, admittedly a prosecution witness,[7/] was never cross-examined about possible inability to perceive due to morphine doses. The defense never offered evidence about the possible effect on his perception of morphine (AOB 62:7-9). It offerered evidence that a dosage had been received (RT 3449, 5688, 5692), then argued inferences in final argument. The strategy is easy enough to describe--

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7. But not, as respondent Gibson contended, the only source of evidence besides Herman Johnson tying him to the murder. Whatever happened to the view Charles Johnson had of respondents and Reginald Muldrew in the shower room? (RT 3023).

Even though Kranzelic was a vital witness, the morphine went only to a minor part of his testimony. Evidence of it could only exert an effect during cross-examination of Kranzelic. Once that spot for introducing the evidence was lost, in effect, all of Kranzelic's testimony was in evidence in strength. Later evidence of diminished perception would have necessarily diminished impact.

the defense felt it sufficient to plant a seed of possible doubt, leaving the jury to speculate on the effect. That strategy succeeded with juror Gauger's unauthorized trip to the library. To now reward it further by reversal of the state court judgment would border on the perverse. The perversity is more glaring when it is remembered that the issue of perception changes due to morphine usage was but a minor aspect of Kranzelic's testimony [see fn. 7, ante].

REASONS FOR GRANTING THE WRIT

Almost eight years ago respondents were found guilty of the murder of a prison guard. Their conviction was unanimously upheld by the California Court of Appeals. The California Supreme Court unanimously refused to grant review. This Court unanimously denied certiorari. A federal district

court denied a writ of habeas corpus. Finally, in the fifth court in which they sought review, respondents were rewarded for their diligence by the granting of a writ of habeas corpus.

The tragedy occasioned by this case is not necessarily that an intermediate court of appeals is able to second-guess and overrule the state judiciary. Federal habeas corpus, which permits a single federal judge to overrule a state supreme court, occasionally produces such unpalatable results. The real tragedy of this case is that the result is totally without support in the record.

The Court of Appeals for the Ninth Circuit concluded that it was federal constitutional error for the jurors to gather evidence on their own. That is strictly a question of law which

we do not presently challenge. But the court also concluded that the error was not harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967). We emphatically disagree with that conclusion and maintain that a reading of the record establishes beyond question the error identified by the court was totally harmless. It could not have possibly contributed to the verdicts and it was a gross abuse of the lower court's power to have held otherwise.

We submit that the lower court's reading of the trial record was so distorted that this Court should exercise its supervisory powers by granting the writ of certiorari, reversing the court of appeals, and reinstating the convictions of two men who were proven guilty by overwhelming evidence. Cf. Sumner v. Mata, 49 U.S.L.W. 4133 (1981).

ARGUMENT

THE ISOLATED INCIDENTS OF JURY MISCONDUCT DID NOT DEPRIVE APPELLANTS OF THEIR DUE PROCESS RIGHT TO A FAIR TRIAL.

In Chapman v. California, 386 U.S. 18 (1967), this court concluded that some constitutional errors are so "unimportant and insignificant" that they do not require reversal of the conviction. Id. at 22. Thus, federal courts of appeal are forbidden to reverse a state criminal conviction if the record establishes that the error was harmless beyond a reasonable doubt. Id. at 24. We submit that the record does establish beyond doubt that the jury misconduct did not contribute to the verdict and we adopt the district court's well-reasoned analysis of the evidence.

"TYPE 'AB' BLOOD

"The properly admitted evidence showed that Justice had type 'AB' blood and that type 'AB' blood was found on the murder weapon, on clothing and on toilet paper used in the attack on Officer Davis. Whether 'AB' blood was rare would be irrelevant to show that Justice was one of the assailants unless other evidence placed Justice at the scene. And if Justice were at the scene, had 'AB' blood, sustained a wound which was bleeding, then the 'AB' blood would be his 'calling card' regardless of its rarity.

"Justice was placed at the scene of the attack by the

testimony of Herman Johnson, the apparent intended victim, by Charles Johnson, the clerk-typist, and to some extent by Ivan Kranzelic, the inmate on the fourth floor of the hospital. The fact that Justice was the only known suspect to have 'AB' blood type is merely further evidence from which the jury could conclude that he was present at the scene of the murder. This is so without any regard for the rarity of his blood type, since his was the only blood which matched that found on the weapon, on the clothing and elsewhere. It was not the rarity but the match up that placed him there. The court is convinced beyond a

reasonable doubt that the evidence of the rarity of the blood type did not contribute to the verdict against Justice.

"Whether Gibson was guilty of murder could not in any way depend upon whether Justice's blood type, 'AB,' was rare. Any consideration by the jury of such a fact, if it did so, did not, beyond a reasonable doubt, contribute to Gibson's conviction.

"KRANZELIC'S MORPHINE DOSAGE

"The eyewitness testimony of Kranzelic has been termed by the petitioners here as crucial to the prosecution. But his testimony only placed the assailants on the fourth floor of the hospital before and

immediately after the attack which took place on the second floor. The intended victim and Charles Johnson placed the assailants on the second floor. Herman Johnson was the only eyewitness to the murder itself.

"While Kranzelic's testimony might have cumulatively added to an overwhelming mountain of testimony surrounding the events of July 21, it is not the testimony which is being complained of here. The jury knew that Kranzelic was taking morphine. However, they were told he had not been sleeping. No testimony was introduced by the defense of any adverse effect that dosage might have had on Kranzelic's

ability to perceive the events he described at trial. While the defense did suggest, in an argument lasting less than a minute, that Kranzelic might have been asleep, the testimony was to the contrary and uncontradicted. The defense did attack, for more than a day of argument, Kranzelic's motive for testifying and reasons for lying. The subsequent discovery by one juror that the amount of morphine was minimal, and the prompt admonition against considering such a fact, negate any contribution such evidence might have had to the verdict. In view of the overwhelming untainted evidence, this Court is convinced

> beyond a reasonable doubt that the research into the effect of the morphine dosage on Kranzelic did not contribute to the verdict." (Appendix B, pp. 26-30).

The Ninth Circuit's arguments in support of its position that the error was not clearly harmless are totally unpersuasive. It is pointed out that the jury deliberated two and one-half days (683 F.2d at 833), as if that indicated confusion or lack of decisiveness on the part of the jury. But the trial took four months. It is surprising that the jury digested the mountain of evidence in as little time as two and one-half days.

The Ninth Circuit also relied on the fact that two jurors felt a need to gather more evidence, an indication of some "lingering hestitation or uncertainty" Ibid. But this argument is based upon the wholly unproved

premise that juror curiosity about some minor aspect of the evidence establishes reasonable doubt about the guilt of the accused. The court's focus was misplaced, for the only relevant question is "the probable impact of the [error] on the minds of an average jury." Harrington v. California, 395 U.S. 250, 254 (1969).

We submit that the evidence gathered is a result of juror misconduct was so insignificant that the error was harmless beyond doubt and that the lower court's holding to the contrary constitutes a gross miscarriage of justice. We ask this Court to redress this egregious wrong.

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CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

DATED: February 2, 1981.

JERRY R. HERMAN
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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EARL B. GIBSON, Appellant, v. THOMAS L. CLANON, Superintendent, Vacaville Medical Facility, Vacaville, California, Appellee.	No. 79-2680 D.C. #76-1125 SW
LAWRENCE JUSTICE, Appellant, v. GEORGE SUMNER, Superintendent, Correctional Training Facility, Soledad, California, Appellee.	OPINION

Appeal from the United States
District Court for the Northern District
of California
Spencer M. Williams, District Judge,
Argued and submitted September 10, 1980

Before: MERRILL, Circuit Judge, MARKEY*, Chief Judge, and BOOCHEVER, Circuit Judge.

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*Honorable Howard T. Markey, Chief Judge, U.S. Court of Customs and Patent Appeals, sitting by designation.

BOOCHEVER, Circuit Judge:

This is an appeal from the judgment of the District Court for the Northern District of California denying petitioners' writ of habeas corpus. The two petitioners, Gibson and Justice, are presently serving life sentences in California state prisons for the 1973 murder conviction of a prison guard at San Quentin. Gibson and Justice allege that the trial jury that convicted them impermissibly relied upon facts that were not in evidence. In doing so they claim they were denied their constitutional right to a fair trial. The district court, which reviewed the state court record, but did not take additional evidence, concluded that any error that may have occurred was harmless beyond a reasonable doubt. Our review of the historical facts in this case convinces us that there is a reasonable possibility that the jury's consideration of facts not introduced into evidence contributed to the jury's verdict. Accordingly, we reverse the judgment.

On July 21, 1971, Leo Davis, an unarmed guard at the San Quentin prison hospital, was stabbed to death. The state's case linking Gibson and Justice to the crime was based principally upon the testimony of three witnesses and the introduction of certain physical evidence.

The state's chief witness was Herman Johnson who testified that he was an eyewitness to the killing. On July 19, 1971, Johnson claimed he was stabbed in the neck by Gibson and Justice shortly after he had been transferred to San Quentin from Soledad. The attack was allegedly provoked by Johnson's willingness to give a statement implicating other inmates in a crime committed at Soledad. After the attack, Johnson was taken to the prison hospital where he was placed in a room on the second floor. David was stattioned in the hallway outside his door.

According to Johnson, at around noon on July 21 he caught a glimpse of Gibson through a window in the door to his room and heard scuffling.

He testified that upon going to the door he was able to see Gibson and Justice stab Davis while a third man held him.

The defendants impeached Johnson's testimony with the testimony of other inmates who stated that they had witnessed the July 19 attack on Johnson, and Gibson and Justice were not among the attackers. The defense implied that there was a possibility that Johnson's testimony was biased because a decision on a parole violation committed by Johnson was allegedly held in abeyance until after his testimony at the trial. The defense also introduced evidence indicating that Johnson had a poor reputation for veracity.

Johnson's eyewitness account was corroborated by two other prosecution witnesses. Another inmate with the last name of Johnson, Charles Johnson, testified that he had seen Gibson, JUstice and a third man in a shower room on the second floor of the hospital within a short time of when the murder occurred.

There was also testimony from Ivan Kranzelic who shared a hospital ward on the fourth floor with Gibson. Gibson had gained admittance to the hospital after allegedly suffering an injury in football practice the day before the murder. Kranzelic testified that on the morning of July 21 he had seen an inmate give a prison-made knife to Gibson, who in turn gave it to Justice. Kranzelic overheard Gibson make various statements such as they would have to do "it" that day. Around noon Gibson, Justice, and a third inmate left the ward and returned about twenty minutes later. Kranzelic testified that Justice's hand was bleeding when he returned and, as he sat on Gibson's bed, he used a roll of toilet paper to try to stop the bleeding. At the time these events were alleged to occur Kranzelic was recovering from foot surgery and had been given several doses of morphine.

At trial the state introduced evidence showing that the murder victim had blood type "O." Justice had blood type "AB." It was further shown

that the blood stains found on the murder weapon, on Gibson's bed where Justice had sat, and on the roll of toilet paper, which was also recovered, all were of blood type "AB."

The trial lasted from December 1972 until April 1973. The jury deliberated for two and a half days before returning a guilty verdict on April 18, 1973. A month later, on May 17, 1973, Gibson and Justice made a motion for a new trial on the grounds that the jury had impermissibly relied upon evidence not produced in court. Affidavits submitted by the jurors reveal two incidents of misconduct.

At one point during the deliberations, Juror Colin Grist went to an encyclopedia to confirm his belief that blood type "AB" was rare. He reported his findings back to other members of the jury. Jurors Chapman, Gauger and Cox remembered some comment by Grist. Grist was unsure whether he made the comment before or after the balloting on Justice.

Another juror, Mona Gauger, stated that

while the jury was considering Kranzelic's testimony she had commented on the dosage of morphine. Other jurors were unsure what effect the morphine may have had on Kranzelic, which Gauger interpreted as a request for more information. She then consulted a medical encyclopedia from which she apparently concluded that the morphine dosage was too small to have affected Kranzelic's perceptions. At least eight other jurors remembered some comment by Gauger, but there was some disagreement as to exactly what she had said.

In both cases there were apparently some comments in the jury room to the effect that the jury should not consider this evidence.

The trial judge denied the motion for a new trial. In his oral ruling the judge considered the applicable test to be that of People v. Watson, 299 P.2d 243, 254 (Cal. 1956), cert. denied 355 U.S. 846 (1957), which, in the courts of California, requires reversal for an error when it is "reasonably probable that a

result more favorable to the appealing party would have been reached in the absence of the error." (Emphasis added.) The judge specifically declined to apply the stricter test of Chapman v. California, 386 U.S. 18, 24 (1967), which requires, in the case of federal constitutional errors, that the error be harmless "beyond a reasonable doubt."

In his ruling, the judge twice indicated that were he to apply the Chapman standard, he would have granted the motion:

> I will state for the record that I cannot say that it [the jury misconduct] was harmless beyond a reasonable doubt.
>
> . . . .
>
> . . . . I don't think the Chapman case applies to this situation. If it does and I were to apply it, I would feel, I think, compelled to reach a different result.

The trial judge's decision was affirmed by an unpublished opinion of the California Court of Appeal. Petitions for certiorari to the California Supreme Court and the United States

Supreme Court were denied. In denying the petitioners' subsequent writ of habeas corpus, the federal district court judge did not specifically decide whether the jury misconduct in this case amounted to constitutional error, but concluded that if there were constitutional error it was harmless beyond a reasonable doubt.

We first must decide whether the California trial judge applied the appropriate test in determining the effect of the impermissibly considered evidence. In United States v. Vasquez, 597 F.2d (9th Cir. 1979), we defined the test to be applied when a jury acquires evidence that has not been introduced into the record.

> [T]he appellant is entitled to a new trial if there existed a reasonable possibility that the extrinsic material could have affected the verdict.

597 F.2d at 193 (emphasis added). The "reasonable possibility" test of Vasquez is equivalent in severity to the harmless error rule applicable to constitutional errors under Chapman.[1]

Vasquez involved a direct appeal from a

trial in a federal district court. Therefore, although it is intimated by the opinion, there was no need to decide whether the "reasonable possibility" test is compelled by constitutional considerations that would make it applicable to the collateral review of a state court judgment.[2] We now conclude that the Vasquez test is compelled by constitutional considerations.

In Turner v. Louisiana, 379 U.S. 466 (1965), the Court refers to sixth amendment rights in considering the impact of outside influence on a jury:

> In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the "evidence developed" against a defendand shall come from the witness in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.[3]

379 U.S. at 472-73.

Turner involved the possibility of prejudice created where the prosecution's leading witnesses were the same two deputy sheriffs who watched over the jury during the time it was

sequestered for Turner's trial. Although the case did not involve the introduction of extra-record facts, the implication of the statement is that it would apply in such a case.[4] A year after Turner, the court reversed a state court decision where a court bailiff made various prejudicial statements about a defendant to jurors. The court noted the applicability of the confrontation clause:

> [T]he statements of the bailiff to the jurors are controlled by the command of the Sixth Amendment. . .

Parker v. Gladden, 385 U.S. 363, 364, (1966):

The Second Circuit has granted habeas corpus relief in two cases where extrinsic material may have influenced a state court verdict.[5] Opinions from other circuits have also cited sixth amendment violations when a jury has considered facts outside of those which have been introduced at trial.[6]

These decisions have noted that when a jury considers facts that have not been introduced in evidence, a defendant has effectively

lost the rights of confrontation, cross-examination, and the assistance of counsel with regard to jury consideration of the extraneous evidence. In one sense the violation may be more serious than where these rights are denied at some other stage of the proceedings because the defendant may have no idea what new evidence has been considered. It is impossible to offer evidence to rebut it, to offer a curative instruction, to discuss its significance in argument to the jury, or to take other tactical steps that might ameliorate its impact.[7] We believe that the California trial judge erred in applying a reasonable probability standard and that the proper standard to be applied is whether it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict.

We must next review the record to determine the effect, if any, of the extrinsic evidence considered by the jury in this case.

The state's case against Gibson and Justice is a strong one. Nevertheless, if the

jury had readily accepted Johnson's eyewitness testimony it seems unlikely that they would have deliberated for so long to reach a verdict.[8] Furthermore, the fact that at least two jurors believed that it was necessary to obtain more evidence is, by itself, an indication that there may have been a need to resolve some lingering hesitation or uncertainty.

The extra-record evidence in this case is of some import in bolstering Johnson's testimony. Evidence that blood type "AB" is rare would logically strengthen the inference that it had been Justice who had possessed the murder weapon and not some unknown assailant with the same type of blood. The trial judge had ruled that evidence concerning the rarity of "AB" blood was inadmissible. The prosecution took an immediate appeal from this ruling, which is some indication of the importance the state attached to this evidence.[9] As to Kranzelic's testimony, if the jury concluded that his perceptions were not affected by morphine this

would certainly strengthen his credibility.

The trial judge candidly acknowledged that were he to apply the test for constitutional error that we have concluded is required in this case, he would have granted the motion for a new trial. Although we are not bound by this evaluation of the historical facts, see e.g., Brown v. Allen, 344 U.S. 443, 456 (1953); Developments in the Law - Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1113 (1970), we nevertheless believe that under the circumstances the state trial judge's conclusion should be given a great deal of weight. The state judge presided over Gibson and Justice's four-month trial and observed the demeanor of the witnesses. At the time of his ruling he was in a far better position to evaluate the credibility of the witnesses than we are now, reviewing a cold record eight years after the trial.

We conclude that there is a reasonable possibility that the extrinsic evidence affected the verdict. Accordingly, the petitioners' writ

of habeas corpus must be granted unless the State of California elects to grant a new trial within sixty days.

REVERSED.

1. The court noted in Chapman:

> There is little, if any difference between . . . "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction" and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."

386 U.S. at 24 (emphasis added).

2. Such a test might conceivably be based upon the supervisory powers of the court. See Murphy v. Florida, 421 U.S. 794, 797-98 (1975).

3. The sixth amendment to the constitution provides in part that an "accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defense."

4. In several cases the court has reversed state court convictions without a showing that specific extra-record facts reached a jury during its deliberations. The cases have involved situations where there has been such peruasive pre-trial publicity that it could be presumed that the jury's verdice was based on either prejudgement of the defendant or consideration of extraneous facts. See Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Irvin v. Dowd, 366 U.S. 717 (1961).

5. Bulger v. McClay, 575 F.2d 407, 411 (2d Cir. 1978), cert. denied 439 U.S. 915 (1978); Owen v. McMann, 435 F.2d 813 (2d Cir. 1970), cert. denied 402 U.S. 906 (1971). See also Downey v. Peyton, 451 F.2d 236 (4th Cir. 1971).

6. Government of Virgin Islands v. Gereau, 523 F.2d 140, 150 (3rd Cir. 1975) cert. denied 424 U.S. 917 (1976) ("consideration by the jury of extra-record facts about the case . . . [is] prima facie incompatible with the Sixth Amendment."); United States v. Thomas, 463 F.2d 1061, 1063 (7th Cir. 1972); Farese v. United States, 428 F.2d 178, 179 (5th Cir. 1970).

7. The Fifth Circuit has referred metaphorically to extraneous evidence as "the dagger of hidden evidence." United States v. Howard, 506 F.2d 865, 866 (5th Cir. 1975).

8. The length of jury deliberations has been cited as a factor of some importance in Parker v. Gladden, 385 U.S. 363, 365 (1966) (26 hours) and Dallago v. United States, 427 F.2d 546, 559 (D.C. Cir. 1969) (5 days). In opposing petitioner's motion for a new trial the prosecution stated that the jury actually only deliberated for "possibly nine hours." Presumably the prosecution meant that this nine hour period was spread over two and one half days. Even accepting the prosecution's version, however, it does not seem possible that the jury would have deliberated nine hours over several days if the jurors did not have serious questions as to the credibility of the eyewitnesses.

9. The fact that a jury has acquired inadmissible evidence has been cited in United States v. Vasquez, 597 F.2d 192, 194 (9th Cir. 1979), and Dallago v. United States, 427 F.2d 546, 558 (D. C. Cir. 1969).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE NOTHERN DISTRICT OF CALIFORNIA

EARL B. GIBSON, Petitioner, v. THOMAS L. CLANON, SUPERINTENDENT, VACAVILLE MEDICAL FACILITY, VACAVILLE, CALIFORNIA, Respondent,	)	NO. C761125SW
LAWRENCE JUSTICE, Petitioner, v. GEORGE SUMNER, SUPERINTENDENT, CORRECTIONAL TRAINING FACILITY, SOLEDAD, CALIFORNIA, Respondent.	)	

MEMORANDUM OPINION AND ORDER

Petitioners Gibson and Justice, who by this petition seek Habeas Corpus relief, were tried and convicted for the murder of Leo Davis, a guard at San Quentin prison. They attack the verdict of the jury, alleging that there were

two incidents of juror misconduct which constituted prejudicial error under Chapman v. California, 386 U.S. 18 (1967).

At the time of the alleged murder, Gibson was confined at San Quentin, serving a sentence for first degree burglary and Clanon was confined, serving a sentence for assault with a deadly weapon. They do not contest the validity of their confinement on those convictions.

FACTS

On July 19, 1971, Herman Johnson, an inmate at San Quentin, was wounded during a fight. Several inmates were present during the fight, and there was testimony at trial that petitioners Justice and Gibson were his assailants. In any case, Johnson was placed in Room 202 on the second floor of the prison hospital, a room with a door capable of being locked for his protection. An unarmed guard, Leo Davis, was assigned to protect

Johnson.

The next day, petitioner Gibson was able to gain entrance into the prison hospital for an alleged injury suffered in a football game. The injury was purportedly to his back. Although the prison doctor was of the opinion that Gibson had not been injured and knew it, Gibson was allowed to stay in bed on the fourth floor.

Ivan Kranzelic, an inmate hospitalized on the fourth floor while recovering from foot surgery, claimed to be a witness to certain events surrounding the death of Officer Davis. Kranzelic was receiving pain medication, including thrice daily dosages of morphine, but he denied he was sleeping. Kranzelic testified that at about 8:30 a.m. on the day of the attack, Justice brought Gibson a pair of pajamas, left and returned about 20 minutes later at a time when Ricardo

Cooper, "Monky D" Palmer and an unidentified tall black man were also present. Subsequently Dr. Erickson, a prison doctor, examined Gibson and when he left Gibson asked Palmer if he had brought the "things" in. When Palmer answered that he had, Gibson said that they had to do "it" that day, as the doctor might want to put him into a cast. The conferees then went into a washroom. When they came out, Kranzelic watched Gibson change into a blue shirt and blue pants. Palmer gave Gibson a seven or eight inch prison-made knife. Justice took the weapon and put it into soiled pajamas he was carrying. Cooper took Kranzelic's crutches, telling him they were for Gibson, and left the room with Gibson and Justice. Palmer followed shortly thereafter.

Charles Johnson, a clerk-typist on the second floor of the hospital, testi-

fied that he went to the room next to Room 202 (Herman Johnson's room), to speak with an inmate named Pierce. Guard Leo Davis asked Charles Johnson to get an attendant for Herman Johnson. He left to do so, and as he rounded the corner, at 11:45 a.m., he saw petitioners and another inmate in the shower room.

Charles Johnson brought inmate Kajar from the nurses' station to attend Herman Johnson. While Kajar did so, Charles Johnson returned to his work station, again passing the shower room. He noticed that the trio was still in the shower. A few minutes thereafter he heard the panic buzzer.

The door to Herman Johnson's room was locked but contained a small window and food tray porthole, out of which the occupant could look. Johnson testified that at about noon her heard a "scuffling"

sound outside the door. He observed Gibson, Justice and a third person, dressed in jail blues. Johnson observed the unidentified man holding Officer Davis around the neck while Gibson and Justice stabbed him. At one point Justice passed the knife to the unidentified man who also struck Davis. Although the assailants were holding Davis, Davis managed to blow his whistle. One of the attackers said that Davis did not have the key, and they vanished.

Kranzelic, still in his bed, observed the trio return about twenty minutes after they had left. Justice limped but still moved quickly; one hand was bleeding. Both petitioners went into the kitchen, and Kranzelic heard running water. Justice's hand was still bleeding later when the trio were seated on Gibson's bed, and Justice used toilet paper to blot the blood, which he then threw into a trash

can. One of the three threw something wrapped in paper out the window when Gibson said to get rid of "it". A few minutes later an officer came in and arrested Gibson.

Officer Davis died from his wounds.

Evidence presented at trial showed that Justice had superficial cuts on his hand July 21; Gibson's and Davis' blood type was "O" and Justice's was "AB". Further evidence was introduced to show type "AB" blood was found on a prison-made knife which was found outside a hospital window and conceded by the parties to be the murder weapon. "AB" blood was found on a pair of pants found in Room 224, on Gibson's bedding, on a smock found in the linen room, and on a toilet paper roll found in a trash can on the fourth floor.

Evidence of the rarity of type "AB" blood was excluded from the trial but the prosecution argued that the "AB"

blood in the case was Justice's "calling card". Evidence was introduced that Kranzelic received three morphine doses on the day of the attack, but no testimony was given as to whether this amount was minimal or would have any effect on his powers of perception. The defense made no serious argument that the dosage affected Kranzelic's perceptions.

The jury convicted petitioners of the murder of Officer Davis.

JUROR MISCONDUCT

Two jurors researched two areas of the case and reported the results of their research to their fellow jurors.[1/]

Juror Colin F. Grist admitted that he consulted an encyclopedia in order to discover how rare AB type blood is in the general population and obtained the information that it was a rare blood type. He believed but was not certain that this was done after the jury had finished

ballotting on defendant Justice. He had some recollection, but was not certain, that he might have mentioned to another juror that AB blood was rare.

Jurors Chapman, Gauger and Cox recalled the statement. Of the nine jurors polled, four recalled the statements, and the affidavits of these jurors indicate that the comment was a brief one and that it prompted an admonition from other jurors that evidence of the rarity of AB type blood was not properly in evidence. Nothing in the affidavits indicated that any juror relied on this information in the reaching their verdict.

In her original affidavit juror Mona Gauger stated that during deliberations she consulted a medical encyclopedia at the request of her fellow jurors to determine the effect on perception of the amount of morphine given to prosecution witness Ivan Kranzelic. Her research confirmed her belief that the dosage was relatively small and

would not have rendered him stuperous or completely unable to perceive events taking place around him. She related this information to the other members of the jury.

In her second affidavit Gauger further explained that during the deliberations concerning Kranzelic's testimony she commented on the dosage of morphine given Kranzelic and some members of the jury said that she "should be sure." She interpreted this as a request to look up the information. She recalled that at some point a juror commented that since no evidence had been produced as to the effect of morphine that they could not consider it.

Juror Chapman recalled Gauger's statement and recalled that he and possibly another juror stated that this information was not evidence produced in court and that therefore it could not be considered by them. The subject was then dropped. Juror Grist recalled Gauger's comment about a morphine dose

but had no recollection of the specific nature of the comment. Foreman Lubersky recalled that Gauger had stated that she had consulted a medical reference book and that the amount of the drug administered was a minimal dosage and that effect was to increase perception and imagination for a couple of hours and give the patient a feeling of well-being. Gauger's remarks lasted no more than a minute. Juror Taylor recalled that Gauger had said that she looked something up in a book and said: " . . . something to the effect that depending on a man's weight that the dose given wouldn't hurt his ability to see or hear." He recalled that two jurors, one being Chapman, commented that this was not in evidence and that they should not be concerned with it. Juror Cox recalled either that Gauger said that the dosage of morphine could have either dulled or sharpened Kranzelic's powers of observa-

tion a little. Juror Storey stated that Gauger had said that in some cases perception would be heightened while in others the recipient would be made drowsy. She recalled that foreman Lubersky commented that this should not be considered as it was not in evidence and that she herself commented that this information had no value or validity. Juror Michael recalled a statement by Gauger that morphine hinders the imagination and further recalled that Lubersky stated that they could not consider this as evidence. Juror O'Brien did not recall Gauger's comment. Juror Mraz recalled that Gauger stated that morphine might make a person more alert and recalled Lubersky's admonition. Here again, there is no indication that the jurors used this information in any way in reaching their verdict. To the contrary, in both instances, the jurors apparently rejected any consideration of

these matters.

Petitioners seek a new trial claiming the above-described conduct of the jurors resulted in a denial of their rights under the Constitution of the United States, including the Sixth Amendment's right of confrontation and cross examination made applicable to state criminal proceedings by Poindexter v. Texas, 380 U.S. 400 (1965); the Sixth Amendment's right to trial by jury which determines guilt solely on evidence taken in court (Turner v. Louisiana, 379 U.S. 466, 472 (1965); Irwin v. Doud, 366 U.S. 717, 722 (1961); Patterson v. Colorado, 205 U.S. 454, 462 (1907)); the due process right to counsel in presenting the case (Geders v. United States, 425 U.S. 80 (1976); Brooks v. Tennessee, 406 U.S. 605, 613-614 (1972); the right to have counsel vigorously argue the case (Herring v. New York, 422 U.S. 853 (1975)); and the right to have the prosecution prove

its case beyond a reasonable doubt (Cool v. United States, 409 U.S. 100, 105 (1972); In re Winship, 397 U.S. 358 (1970)).

TRIAL JUDGE'S RULING ON JUROR MISCONDUCT

At a hearing on the motion of defendants' for a new trial, the trial judge in this case orally denied the motions with a lengthy statement of his reasoning. Inter alia, the judge decided to follow the California state constitutional test, as laid down in People v. Watson, 46 Cal. 2d 818, 836 (1956), cert. denied, 355 U.S. 846 (1957), and not the test of Chapman v. California, 386 U.S. 18 (1967). The judge was clear in his reasoning:

> the conduct of the jurors in this case in taking the testimony with regard to morphine and the AB blood would not affect the result [the verdict] in [the Watson] sense.
>
> * * *

I will state for the record that I cannot say that it was harmless beyond a reasonable doubt. Now I think these are judgments that basically that an appellate court has to make. I think they are entitled to make their own independent judgments as to the more probable cause test and the harmless beyond a reasonable doubt, ...

* * *

Which to apply? The Chapman (sic) test, which I don't think applies and the reason I don't think it applies, it is not every denial of confrontation and it is not every interference by misconduct on the part of the jury that rises to Constitutional dimension. Any erroneous admission of hearsay evidence

> is a denial of confrontation in a sense, and I don't think the Chapman case applies to this situation. If it does and I were to apply it, I would feel, I think, compelled to reach a different result. (Reporter's Transcript, June 22, 1973, pages 659-660.)

On that basis, the claim of misconduct was found to be insufficient to warrant a new trial.

CALIFORNIA APPELLATE COURT RULING

The California Court of Appeals, which considered the affidavits and related the content as stated above, then found that:

> [t]he jurors did not request that Gauger research the subject. Furthermore, the jurors received prompt admonitions that the matter should not be considered as it was not presented in evidence

and the discussion was very brief, lasting perhaps only a minute.

DISCUSSION

Two legal tests by which to measure the impairment, if any, of the defendant's rights by juror misconduct have left this criminal action in an unsettled posture. The Watson test, applied under California's state constitution, and the Federal test may not be the same.[2/]

People v. Watson, 46 Cal.2d 818, 836 (1956), cert. denied, 355 U.S. 846 (1957), created a "reasonably probable" test for measuring harmless error. Evidence which the state supreme court found to have been "undoubtedly collateral and irrelevant to any issue in the case" (Id. at 834) was admitted by the trial court,[3/] and was attacked by appellants on appeal. In reviewing the result of this error, the supreme court found that there had been

harmless error within the meaning of California Constitution article VI, section 4-1/2, which read "No judgment shall be set aside . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." The exact nature of the phrase "miscarriage of justice" has been interpreted on many occasions, and the court concluded that the result of any trial should only be declared a "miscarriage of justice"

> when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. (46 Cal.2d at 836.)

This test was applied by the trial judge at the conclusion of Gibson's and Justice's motions for a new trial and the misconduct of the jury was found to have been harmless error.

If this test is to be applied by this federal district court, the opinion of the trial judge should be given great weight, since the opinion is based upon an interpretation of a state constitutional provision and the state court trial judge has infinitely more experience and expertise in making such an interpretation than this court would have.

The standard under the federal constitutional provisions, may however, differ from this test. In Chapman v. California, 386 U.S. 18 (1967), the state prosecuting attorney commented, as he was permitted to do under California's constitution, on the failure of the defendants to testify. After trial and before the California

superme court decided the appeal, the Supreme Court decided Griffin v. California, 380 U.S. 609 (1965) which found the practice of commenting on a failure to testify violative of the Fifth Amendment to the Constitution of the United States. The question in Chapman then was which test to apply in ruling on the issue of a constitutional error by a trial court.[4/] 386 U.S. at 21-23.

The Court noted that all 50 states have harmless error rules or statutes, and the Congress had long before established such a statutory rule for federal proceedings. See 28 U.S.C. § 2111. The federal rule provided that judgments should not be reversed for "errors or defects which do not affect the substantial rights of the parties." Id.

> None of these rules on its face distinguished between federal constitutional errors and errors

> of state law or federal statutes and rules. All of these, state or federal, serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial. (Id.)

The Court then addressed the problem of insignificant constitutional errors which would not have changed the result of the trial: "We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." Id.

The Chapman court in fashioning a harmless-constitutional error rule, began by pointing out the emphasis on "sub-

stantial rights" in the federal statute.[5/] The Court then claimed to adopt the approach taken in Fahy v. Conneticut, 375 U.S. 85, 86-87 (1963):

> We prefer the approach of this Court in deciding what was harmless error in our recent case of Fahy . . . . There we said: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." . . . Although our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error, this statement in Fahy itself belies any belief that all trial errors which violate the Constitution automatically

> call for reversal. At the same time, however, like the federal harmless error statute, it emphasizes an intention not to treat as harmless those constitutional errors that "affect substantial rights" of a party. An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under Fahy, be conceived of as harmless. (Chapman v. California, 386 U.S. 18, 23-24 (1967).

The Court restated the harmless error rule while asserting that the rule adhered to meaning of the Fahy case: "we hold . . . that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Id.

The error in Chapman was then measured in terms of the constitutional test and held to have been harmless.

The harmless constitutional error test was subsequently discussed by the Supreme Court in Harrington v. California, 395 U.S. 250 (1968). In that case, Justice Douglas speaking for a divided court stated "We do not depart from Chapman; nor do we dilute it by inference. We reaffirm it." 395 U.S. at 254. However, in reaching his decision to affirm appellant Harrington's conviction, Douglas said:

> (T)he case against Harrington was so overwhelming that we conclude that this violation of Bruton was harmless beyond a reasonable doubt, unless we adopt the minority view in Chapman (386 U.S., at 42-45) that a departure from constitutional procedures should result in an

> automatic reversal, regardless of the weight of the evidence. (Id. at 254.)

And again:

> The case against Harrington . . . is so overwhelming that unless we say that no violation of Bruton can constitute harmless error, we must leave this state conviction undisturbed. (Id.)

The dissent (by Mr. Justice Brennan, with whom the Chief Justice and Mr. Justice Marshall joined) lamented:

> The Court today overrules Chapman v. California . . . the very case it purports to apply . . . The Court today by shifting the inquiry from whether the constitutional error contributed to the conviction to whether the untainted evidence provided "overwhelming" support for the con-

> viction puts aside the firm resolve of Chapman . . ." (395 U.S. 250, 255 (1969) (Brennan, J., concurring).)

We have found no subsequent Supreme Court case which dilutes the impact of Harrington.

In the present case, the trial judge found that the Watson test, which he applied, exonerated the misconduct of the jurors: the erroneous admission of evidence which the jury considered did not result in the reasonable probability of a different verdict. The trial court discussed but declined to apply the Chapman case.

For the reasons stated below, this court is of the opinion that the error was harmless under either Chapman or Harrington.

TYPE "AB" BLOOD

The properly admitted evidence showed that Justice had type "AB" blood and that

type "AB" blood was found on the murder weapon, on clothing and on toilet paper used in the attack on Officer Davis. Whether "AB" blood was rare would be irrelevant to show that Justice was one of the assailants unless other evidence placed Justice at the scene. And if Justice were at the scene, had "AB" blood, sustained a wound which was bleeding, then the "AB" blood would be his "calling card" regardless of its rarity.

Justice was placed at the scene of the attack by the testimony of Herman Johnson, the apparent intended victim, by Charles Johnson, the clerk-typist, and to some extent by Ivan Kranzelic, the inmate on the fourth floor of the hospital. The fact that Justice was the only known suspect to have "AB" blood type is merely further evidence from which the jury could conclude that he was present at the scene

of the murder. This is so without any regard for the rarity of his blood type, since his was the only blood which matched that found on the weapon, on the clothing and elsewhere. It was not the rarity but the match up that placed him there. The court is convinced beyond a reasonable doubt that the evidence of the rarity of the blood type did not contribute to the verdict against Justice.

Whether Gibson was guilty of murder could not in any way depend upon whether Justice's blood type, "AB", was rare. Any consideration by the jury of such a fact, if it did so, did not, beyond a reasonable doubt, contribute to Gibson's conviction.

KRANZELIC'S MORPHINE DOSAGE

The eyewitness testimony of Kranzelic has been termed by the petitioners here as crucial to the prosecution. But his testimony only placed the assailants on the

fourth floor of the hospital before and immediately after the attack which took place on the second floor. The intended victim and Charles Johnson placed the assailants on the second floor. Herman Johnson was the only eyewitness to the murder itself.

While Kranzelic's testimony might have cumulatively added to an overwhelming mountain of testimony surrounding the events July 21, it is not the testimony which is being complained of here. The jury knew that Kranzelic was taking morphine. However, they were told he had not been sleeping. No testimony was introduced by the defense of any adverse effect that dosage might have had on Kranzelic's ability to perceive the events he described at trial. While the defense did suggest, in an argument lasting less than a minute, that Kranzelic might have

been asleep, the testimony was to the contrary and uncontradicted. The defense did attack, for more than a day of argument, Kranzelic's motive for testifying and reasons for lying. The subsequent discovery by one juror that the amount of morphine was minimal, and the prompt admonition against considering such a fact, negate any contribution such evidence might have had to the verdict. In view of the overwhelming untainted evidence, this Court is convinced beyond a reasonable doubt that the research into the effect of the morphine dosage on Kranzelic did not contribute to the verdict.

CONCLUSION

There is no question that this jury's misconduct was error. Under the Watson test, applied pursuant to California constitutional law, the court concludes there is no reasonable probability that the evidence admitted by juror misconduct

would have altered the verdict. Under the Chapman-Harrington test, the court finds beyond a reasonable doubt that this evidence, erroneously admitted, did not contribute to the verdict. Therefore,

IT IS ORDERED that the petition for habeas corpus relief, filed by petitioners Gibson and Justice, be and the same is denied.

DATED: February 11, 1977

/s/ Spencer Williams
UNITED STATES DISTRICT JUDGE

FOOTNOTES - Earl Gibson and Lawrence Justice v. Thomas Clanon, Superintendent, etc. et al., No. C-76-1125 SW

Page 18 1/ This conduct was established by affidavits filed to impeach the verdict on the basis that the jury's verdict was improperly influenced by conduct consisting of overt acts which are objectively ascertainable, i.e., influence open to sight, hearing and other senses and thus subject to corroboration. Calif. Evid. Code § 1150; see People v. Hutchinson, 71 Cal.2d 342, 349-350 (1969). The summary of the content of the affidavits is taken from the opinion of the California Court of Appeals, 1 Crim. 12598, November 14, 1975.

Page 17 2/ Compare People v. Watson, 46 Cal.2d 818, 836 (1956), cert. denied, 355 U.S. 846 (1957), with Chapman v. California, 386 U.S. 18 (1967). But cf., Harrington v. California, 395 U.S. 250 (1968).

Page 17 3/ Appellant wore an army uniform during his trial. The prosecution introduced a letter in which appellant intimated to army authorities that his height was more than the maximum accepted by the military at the time. This evidence was ostensibly used to rebut the inference appellant attempted to draw of patriotic fervor by showing that he really wanted to get out of the army.

Page 20 4/ The Court first found that the Fifth Amendment right of the petitioners to remain silent made applicable to the state court proceedings through the Fourteenth Amendment was a federal right requiring the Court to fashion a federal rule. 386 U.S. at 21.

Page 22 5/ The Court noted the similarity with the California standard which prevents a miscarriage of justice, but also noted that the California courts have neutralized this to some extent by emphasis, perhaps overemphasis, upon a view of overwhelming evidence. The state court in Chapman found no miscarriage of justice as to one appellant because it found from "other substantial evidence . . . the proof of his guilt must be deemed overwhelming." Id. at 23 and 23 n.7.

APPENDIX C

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT
DIVISION ONE

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. EARL BILLY GIBSON and LAWRENCE JUSTICE, Defendants and Appellants.	1 Crim. 12598 (Sup. Ct. No. 4150)

Defendants Earl Billy Gibson ("Gibson") and Lawrence Justice ("Justice") appeal from the judgment upon convictions as follows: Both defendants for violation of Penal Code section 187 (murder); and Gibson, for two counts of violating Penal Code section 4500 (assault on a non-inmate by one serving less than a life sentence). Each defendant makes several assignments of error which he claims to be prejudicial. In order to place the respective contentions in proper

perspective we set out the facts in pertinent detail.

The Facts

Herman Johnson, an inmate in San Quentin Prison, testified that Gibson had accused him of being a witness in a case involving the murder of a correctional officer at Soledad Prison. Johnson denied the accusation, but notwithstanding his denial Gibson told him on two occasions that he was going to "get hit."

On July 19, 1971, Johnson encountered Gibson and Justice at the foot of a flight of stairs. Johnson was stabbed in the neck by Gibson and was taken to the prison hospital. On the following day Gibson went to football practice. He complained of an injury to his back and was taken to the prison hospital. Gibson was examined the next morning by a doctor who determined that there was no external evidence of injury and authorized his release from the hospital.

Johnson had been assigned to room 202 on the second floor of the prison hospital. For security purposes Officer Leo Davis was placed in front of the door to Johnson's room. Johnson testified that on July 21, 1971, at around noon, he heard a "scuffling" sound outside his door. The door to his room, which was locked, had a small window and a food tray "porthole." Johnson observed Gibson, Justice and a third person whom he described as a tall black man who wore his hair in a large natural. The three men were dressed in jail blues, and Gibson wore a blue wool cap. Johnson observed the unidentified man holding Officer Davis around the neck while Gibson and Justice struck him. Johnson stated that at one point he saw Justice pass a knife to the unidentified man who then hit the officer. Johnson heard a whistle blow softly and then heard someone say, "He don't have the key."

Ivan Kranzelic, an inmate on the fourth floor of the prison hospital, testified to certain events which he claimed to have observed immediately preceding and following the attack on Officer Davis. Although he acknowledged that he had received morphine for pain, he denied sleeping. He stated that on the day of the attack, at about 8:30 a.m., a man known as "Choice" brought Gibson a pair of pajamas. "Choice" left and returned about 20 minutes later at which time Ricardo Cooper, "Monky D" Palmer and an unidentified tall black man were present. At about 10:00 a.m., Dr. Erickson examined Gibson and when he left Gibson inquired of Palmer, "'Monky D,' did you brought that things in?" When Palmer stated that he had Gibson said, "We have to do it today, doctor might put me in a cast." Gibson, "Choice," Cooper and the tall black man went into the washroom. When they came out Kranzelic observed Gibson changing into a

blue shirt and blue pants and observed Palmer hand a "shank" to Gibson, which "Choice" then placed between a bunch of pajamas. Gibson asked Cooper how he could pass by Miss Baldwin and Cooper said he would take care of that. Cooper took Kranzelic's crutches, telling him they were for Gibson. Cooper, Gibson and "Choice" left the room. A few minutes later Palmer left.

About 20 minutes later, Cooper, Gibson and "Choice" returned. They were walking rapidly. They went into the kitchen and Kranzelic heard water running. The three men and Palmer, who had been in the kitchen, came out of the kitchen and went to Gibson's bed. Gibson asked "Mike", who was standing in front of the kitchen, if the cops were coming. Gibson was wearing a T-shirt. It had a blood spot on the side. Gibson took his clothes off and put them in his night locker, which he pushed to the end of the

room near the last bed. Gibson brought the locker from that bed to his bed. He took something wrapped in paper from under the blanket of his bed and handed it to "Robert" telling him to get rid of it. Robert threw it out of the window. Gibson handed his T-shirt to Cooper who went in the washroom. Kranzelic heard a tearing sound and a flushing of the toilet.

Kranzelic testified further that "Choice" came out of the kitchen area holding his hand and some paper. He went to Gibson's bed and threw the paper in a garbage can. Palmer threw a roll of toilet paper with blood spots on it in the same garbage can. Cooper wore a lab coat under which he hid an object that looked like a screw driver. Gibson put on a new pair of pajamas. A few minutes later an officer came in and arrested Gibson.

Kranzelic described "Choice" as being five feet four inches tall, between 22

and 24 years of age, with long messy hair. He stated that "Choice" was a weight lifter and that he walked with a limp. At a pre-trial hearing Kranzelic identified a photograph of defendant Justice as the person he knew as "Choice." At the grand jury hearing Kranzelic could not identify a photograh of Justice.

Wayne Clark, a correctional officer, searched the fourth floor of the prison hospital for evidence. He found a roll of toilet paper with red stains on it in a trash can.

Charles Johnson, an inmate, testified for the prosecution. He stated that on July 21, 1971, at about 11:45 a.m., he went to visit a patient in the room next to that occupied by Herman Johnson on the second floor of the prison hospital. Officer Davis, who was guarding Herman Johnson's room, asked Charles Johnson to summon an attendant. As

Charles Johnson went around the corner he saw Gibson, Justice and Reginald Muldrew in the shower room. Charles Johnson summoned inmate Kajor, a hospital attendant, from the nurse's station and accompanied him back to Herman Johnson's room. He noticed that Gibson, Justice and Muldrew were still in the shower room.

Charles Johnson visited the patient in the room next to that of Herman Johnson and then went down to the first floor. While there he heard the panic buzzer and upon hearing the officers say "second floor" he went upstairs to the second floor where he observed Justice and Muldrew. Justice asked Charles Johnson what had happened and Johnson replied that he didn't know. A nurse told Charles Johnson to proceed downstairs. While on the first floor Charles Johnson observed that both Justice and Muldrew were there. Justice was permitted to go through the center grille gate.

Officer George Randolph escorted Justice out of the clinic door. Officer Randolph noticed that Justice had something in his right hand. When he asked Justice to open his hand Justice glared at him but complied, revealing blood-stained tissue paper and a deep cut between the thumb and forefinder. Officer Ayres also observed that one of Justice's hands was closed around some paper.

Justice's hand was examined by Arthur Simon, a medical technical assistant, at about 2:25 p.m. He observed three incise wounds on the palm, which he described as superficial and of the type resulting from a cut by a knife, razor or piece of glass. Simon testified that in his opinion the wounds were fresh, possibly two or three hours old, but that it was possible that they were a few days old.

A white-over-brown rubber shower thong was found near room 202, occupied by

Herman Johnson. A similar thong was found in room 224. The first was a left thong and the second a right thong. Officer Ayres testified that Justice customarily wore a pair of rubber shower thongs while in the hospital and that these were white on the top and brown on the bottom. When Justice was taken from the hopsital about 30 to 45 minutes after the attack on Officer Davis, he was wearing green and white thongs of a different shape than the one he customarily wore.

Ellis Baker, an employee of the Department of Corrections who participated in the search of the second floor of the hospital, observed a knife on the roofwell from the window in room 226. When retrieved, the knife, which had a wooden handle and some tape next to the handle and the blade, had red faded stains on the tape and blade. In room 224 bloodstains were discovered on the bedsheets. A blue shirt, blue pants and a

pile of freshly laundered pajamas were found under the bed in room 224. A rubber shower thong was found in the pile of pajamas. Some of the pajamas had bloodstains, as did the blue shirt and the blue pants. There were bloodstains on the sink by the door and on the bed. The bloodstains on the sink appeared to be fresh. There were smudged fingerprints on the window panes. Fingerprints were also found on the knife, but they could not be identified.

It was stipulated that Officer Davis died of knife wounds. Davis received nine wounds, all of which were consistent with having been inflicted by a single weapon.

Records of the Alameda-Contra Costa Medical Association Blood Bank were introduced into evidence. These disclosed that Officer Davis' blood type was "O." Blood samples were taken from Gibson and Justice pursuant to search warrants and the results

were admitted into evidence. Gibson's blood type is "O" and that of Justice is type "AB."

Louis Maucieri, a criminalist employed by the Department of Justice, was permitted to testify as an expert, over defense objections as to his qualifications. He testified that "AB" type blood was found on the kinife, on a pair of denim pants found in room 224, on a roll of toilet paper found in a fourth floor trash can, on a white jacket found in the fourth floor soiled linen hamper, and on Gibson's bedding.

Sufficiency of the Evidence

Both defendants contend that the evidence was insufficient to sustain a verdict against them. In considering this contention we must take cognizance of the following basic rules applicable to appellate courts: (1) "The test on appeal is whether there is substantial evidence to support the conclusion of the trier of fact; it is not

whether guilt is established beyond a reasonable doubt." (People v. Redmond, 71 Cal.2d 745, 755; see also People v. Mulqueen, 9 Cal.App.3d 532, 540.); (2) The appellate court "must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (People v. Redmond, supra, 71 Cal.2d 745 at p. 755.); (3) Before the appellate court may set aside a judgment of conviction on the basis of insufficiency of the evidence, it must clearly appear that under no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. (People v. Spencer, 71 Cal.2d 933, 937; People v. Redmond, supra, 71 Cal.2d 745 at p. 755.)

Gibson contends that the prosecution's case against him was so thoroughly destroyed by the evidence adduced at the

trial that a reversal is compelled. With respect to the July 19 attack on Herman Johnson, reliance is placed on the testimony of several alibi witnesses who stated that either they saw the attack on Herman Johnson and that Gibson was not among the attackers or that Gibson was elsewhere at the time the incident occurred, and on the failure of Herman Johnson to identify Gibson when he was first interviewed by correction officers after the attack. Gibson's statement to the officers does not compel the inference that he could not identify his attackers. He merely refused to identify his attackers and told the officers to wait and see it if happened again. At the trial Herman Johnson identified Gibson as his attacker. The credibility of Herman Johnson and the alibi witnesses was a matter for the jury.

With respect to the July 21 attack on Officer Davis, Herman Johnson's testimony

that he observed the attack and that Gibson was one of the attackers and the inferences that can be drawn from the testimony of Kranzelic and Charles Johnson with respect to Gibson's conduct at or about the time of the attack provide substantial evidence that Gibson participated in the attack. Gibson's criticism of the prosecution's theory that he faked an injury in order to obtain access to the hopsital in order to "finish the job" on Herman Johnson is a reasonable inference in view of the testimony of Dr. Erickson and that of Kranzelic. The fact that Gibson did receive a slight injury at football practice does not dissipate the prosecution's theory. Gibson's argument that the testimony of Kranzelic, Charles Johnson and Herman Johnson indicates that Palmer was Davis' assailant does not compel such an inference, but to the contrary, was such as to warrant an inference that Gibson was the assailant.

Justice contends that, except for the testimony of Herman Johnson, there is no evidence that he was in the area where the attack on Johnson took place. Although three witnesses testified that Justice was elsewhere at the time of the attack, Johnson's testimony, if believed by the jury, would suffice to supply substantial evidence of Justice's participation in the attack. With respect to the attack on Officer Davis, Herman Johnson testified that Justice was present during the attack and that he observed Justice pass a knife to a tall black man who hit the officer with the knife. Kranzelic's testimony as to Justice's conduct at or about the time of the attack, Charles Johnson's observations of Justice in the vicinity of the area of the attack and the circumstances surrounding the cuts on Justice's hand are susceptible of inferences that Justice participated in the attack on Davis.

Defendants' attack is directed primarily to the credibility of three prosecution witnesses and is predicated on certain inconsistencies in their testimony. They allege that each of these witnesses testified falsely for the prosecution in expectation of a parole. These inconsistencies and alleged biases were fully developed at the trial. It was for the jury to weigh the credibility of these witnesses as well as the credibility of the defense witnesses.

Grand Jury Organization

We consider, first, defendants' contention that the jury which returned the indictments against them was not selected in a constitutionally premissible manner. In People v. Pinell, 43 Cal.App.3d 627, 635 [cert. den., 43 U.S.L.W. 3659] (U.S. June 16, 1975), the same grand jury which indicted defendants was held to have been selected in a constitutionally permissible manner.

The Search Warrant

Search warrants authorizing the taking of blood samples from each of defendants was authorized. Defendants moved to suppress the blood samples taken pursuant to the warrants upon grounds of insufficient showing of probable cause. The petition was denied. The blood samples were analyzed for blood type and the results were admitted into evidence. These results provided a link in the prosecution's efforts to connect Justice to the killing by seeking to establish that his blood was on the knife alleged to be the murder weapon.

The search warrant was issued on the basis of the affidavit of Correctional Sergeant William Hankins. Attached to the affidavit was a copy of the transcript of the testimony of Herman Johnson given before the grand jury. Defendants contend that Johnson's grand jury testimony was not

properly before the magistrate and therefore cannot form the basis of probable cause for issuance of the search warrants.

Hankins' affidavit states, in part, that he had read a certified copy of the grand jury transcript attached as an exhibit to the affidavit and that the testimony therein of Herman Johnson indicated that defendants were two of the persons who stabbed and killed Officer Leo G. Davis. Hankins did not purport to swear to the truth of the matters contained in the grand jury testimony of Herman Johnson but merely stated that defendants had been indicted by the grand jury for Officer Davis' murder and that a copy of the indictment and the grand jury transcript were attached to and incorporated in his affidavit. Hankins' allusion to Herman Johnson's testimony was for the purpose of stating the ground for the issuance of the search warrants. The factual basis

for the issuance of the search warrnat was the grand jury transcript itself, an official document which indicated that the matters therein testified to were given under oath by the witness giving the testimony. The incorporation of the grand jury transcript in the affidavit was proper. (See People v. Sloss, 34 Cal.App.3d 74, 81-82; and see United States v. Ventresca, 380 U.S. 102, 108.)

Defendants assert that the grand jury testimony of Herman Johnson does not meet the requirements of Aguilar v. Texas, 378 U.S. 108. Aguilar holds that an affidavit for a search warrant may be based on hearsay information and need not reflect the direct personal observations of the affiant, but that it must contain both the underlying circumstances from which the informant concluded that a crime had been committed and some of the underlying circumstances from which the officer concluded that the information was credible or his information

reliable. (At p. 114.) Accordingly, the affidavit must allege the informant's statement in language that is factual rather than conclusionary and must establish that the informant spoke with personal knowledge of the matters contained in the statement, and the affidavit must contain some underlying factual information from which the magistrate issuing the warrant can reasonably conclude that the informant was credible or his information reliable. (Skelton v. Superior Court, 1 Cal.3d 144, 152; People v. Superior Court, 6 Cal.3d 704, 711.)

In the present case, Herman Johnson's testimony before the grand jury was clearly factual in nature and indicated that he had personal knowledge of the facts related.[1/] His testimony under oath was as

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1. Herman Johnson's testimony before the grand jury as to his observations was essentially as given at the trial, the substance of which is included in the narrative of the facts above set forth.

to matters and conduct personally observed by him. This testimony was also sufficient to supply the underlying factual information from which the magistrate could conclude that Herman Johnson was speaking truthfully and that the information was reliable. It was reasonable for both the magistrate and Hankins to conclude that Herman Johnson was both the victim of and a witness to a crime from the nature of the information given by him and the circumstances under which such information was given.

The parties dispute at length whether Herman Johnson can be characterized as a "citizen-informer." The People contend that because Herman Johnson was a victim of and a witness to a crime his reliability is presumed. Defendants argue that because Johnson was a prison inmate, a felon, and a prosecution witness he was not a "citizen-

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informer."[2/] In the present case we need not determine whether Johnson can be characterized as a "citizen-informer." Such a characterization is important only in determining whether the magistrate could reasonably rely upon the information supplied to him under the circumstances. Here the circumstances before the magistrate were quite different

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2. Corroboration of information received from an informant is unnecessary for search warrant purposes where the informant's statements are made as the victim of a crime or on his personal observation of a crime. (People v. Hill, 12 Cal.3d 731, 761; People v. Paris, 48 Cal.App.3d 766, 772-773.) In such a case the informant is presumptively reliable as a "citizen-informant" even though his reliability has not been previously tested. (People v. Hill, supra; People v. Hogan, 71 Cal.2d 888, 890; People v. Paris, supra, at p. 773.) A "citizen-informant" is distinguished from a mere informer who gives a tip to law enforcement officers that a person is engaged in the course of criminal conduct. (Kraus v. Superior Court, 5 Cal.3d 418, 421-422; People v. Hogan, supra, 71 Cal.2d 888, 891.) Accordingly, experienced stool pigeons or persons criminally involved or disposed are not regarded as "citizen-informants" because they are generally motivated by something other than good citizenship. (People v. Scoma, 71 Cal.2d 332, 338, fn. 7; People v. Griffin, 250 Cal.App.2d 545, 551; People v. Lewis, 240 Cal.App.2d 546, 550.)

from the ordinary situation where the affiant is relying upon information from an informant, a victim of a crime or a witness to a crime. Here the affiant was relying upon information given by Herman Johnson through testimony under oath before a grand jury. Under these circumstances the magistrate could reasonably conclude that the informant was credible or that his information was reliable. In testifying before a grand jury a witness is exposing himself to charges of perjury as well as to an action for malicious prosecution if he makes unfounded charges. Such a person is more than a mere informer who gives a tip to law enforcement officers or who is criminally involved or disposed. The badge of reliability is impressed upon the informant because he is a witness under oath in a legal proceeding subject to the sanctions imposed by law if he testifies falsely. (See People v. Hogan, supra, 71 Cal.2d 888, 890-891.)

Defendants next contend that the search warrant does not present particularized facts which demonstrate an evidentiary "nexus" between the property seized and the crime under investigation under the principle articulated in Warden v. Hayden, 387 U.S. 294, 307, that ". . . probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction."

The thrust of defendants' contention is that in the instant case a showing of the evidentiary value of the blood types of defendants would have to include (1) probable cause to believe that the AB type blood found on the alleged murder knife was not that of the victim, and (2) probable cause to believe that one or both of defendants left their blood on the knife. The affidavit, they contend, fails on both counts.

Although the affidavit does not state that the victim's blood type was not AB

or that either of the defendants had wounds on his body, it does state certain facts from which the magistrate could find probable cause that the AB type blood found on the knife was not that of the victim and that one or both of the defendants left their blood on the knife. The affidavit states that the affiant was advised by correctional officers that Officer Davis had been stabbed numerous times by assailants while he was on duty in front of room 202 of the hospital. From his personal knowledge, the affiant was aware that Officer Davis and others had been assigned to guard Herman Johnson, the patient in room 202. He had been advised that a knife had been found in a corner of as roof-well immediately adjacent to room 224 and he personally observed the knife in this position. He observed bloodstains on the knife. He also ". . . personally examined the hospital corridor area adjacent to room 202 and

observed several large splotches and droplets of fresh blood on the floor, leading away from room 202 and toward the center corridor where room 224 was located." The alleged fact that a trail of droplets of blood led from the area where the officer was stabbed to the room adjacent to the place where the murder knife was found reasonably suggests that the assailants fled to the area of room 224 leaving a bloody trail. The reasonable interpretation is that either the victim's blood was dripping from the knife or that one or both of the assailants was injured and bled while fleeing from the scene of the crime.

We conclude that the affidavit does not fail as a matter of law to set forth competent evidence supportive of the magistrate's finding of probable cause. The facts stated are such as would lead a man of ordinary caution and prudence to believe and conscientiously entertain a strong suspicion of the

guilt of the accused in the light of the facts and circumstances presented. (See Skelton v. Superior Court, 1 Cal.3d 144, 150.) Probable cause does not need as strong evidence as is needed to convict, and it is the function of the magistrate, not the reviewing court, to appraise and weigh the evidence presented by the affidavit in support of a search warrant. (Skelton v. Superior Court, supra; see United States v. Ventresca, supra, 380 U.S. 102, 107.)

Defendants also contend that the affidavit is invalid because it does not identify the person to be searched or the things to be seized. They state that only the warrants contain such description. The federal constitutional mandate is that "no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be

seized." (U.S. Const., 14th Amend.). The California Constitution contains similar language. (Art I, § 13.) The mandate is also to be found in Penal Code section 1525, which provides that the warrant cannot be issued but upon probable cause supported by an affidavit naming or describing the person and particularly describing the property and place to be searched.

In People v. Alvarado, 255 Cal.App. 2d 285, 291, the applicable test is described as follows: "It [the affidavit] must describe with reasonable particularity the place to be searched, and the property to be seized. [Citation.] The test for the latter is 'whether the warrant places a meaningful restriction on the objects to be seized.' [Citation.]" (See Aday v. Superior Court, 55 Cal.2d 789, 796.)

The affidavit in the instant case sets forth with particularity the affiant's

personal observations and verifications from prison records of defendants' presence at the prison hospital at the time of the homicide; that he assisted in the investigation of the stabbing and the finding of a knife on the roofwell immediately adjacent to room 224 in the prison hospital; his examination of the knife and his observation of the bloodstains thereon; his receipt of the report from the criminalist that the bloodstains on the knife were of group AB human blood; his observations of fresh blood on the floor of the prison hospital leading from room 202, where Officer Davis had been guarding Herman Johnson, toward room 224; his observations of a number of latent fingerprints having been lifted from the wall area around room 202; and his reference to the testimony given by Herman Johnson to the grand jury that defendants had stabbed Officer Davis. The affidavit then concludes as follows: "Wherefore

your affiant prays that an order of this court issue allowing the procurement of the above mentioned samples of evidence for the purpose of comparing the same with blood stained knife and fingerprints mentioned above on the grounds that said comparisons will tend to show that a felony has been committed."

An examination of the search warrant indicates that the affidavit executed by Hankins was presented to a judge of the superior court and that the search warrant was restricted to the blood samples and fingerprints of defendants sufficient for testing. It is apparent that the warrant restricts the things to be seized and that the magistrate understood from a reading of the affidavit, which specifically mentioned defendants by name as the persons who stabbed Officer Davis, that the purpose of the search warrant was to obtain blood samples from

defendants in order to compare them with the bloodstains on the knife and to obtain defendants' fingerprints in order to compare them with those taken from the wall area around room 202.

In United States v. Ventresca, supra, 380 U.S. 102, 108-109, the Supreme Court observed that ". . . affidavits for search warrants . . . must be tested . . . in a commonsense and realistic fashion" and not by "[t]echnical requirements of elaborate specificity once enacted under common law pleadings . . ." (See People v. Superior Court, 6 Cal.3d 704, 711.) Accordingly, we conclude that the affidavit in support of the search warrant in the present case met the constitutional, statutory and decisional requirements.

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Blood Type Evidence

The court overrruled defendants' objections to the admissibility of evidence that AB blood type was found on the knife retrieved from the roof well adjacent to room 224, on a pair of blue denim pants found in room 224, on a roll of toilet paper found in a trash can on the fourth floor of the prison hospital and on a white jacket taken from a linen hamper on the first floor of the hospital, and that Justice's blood type was AB. Defendants contend that the court erred in admitting the evidence.

The precise issue has not been presented to a California appellate court. In several cases in which blood grouping tests were admitted, admissibility was apparently presumed. (See People v. Kemp, 55 Cal.2d 458 [cert. den., 368 U.S. 932]; People v. Jordan, 45 Cal.2d 697; and People v. Mummert, 57 Cal.App.2d 849 disapproved on other grounds in People v. Collins, 54 Cal.2d 57, 60];

see also People v. Deriso, 222 Cal.App.2d 478.)

The weight of authority in this country holds that the results of blood grouping tests are admissible in evidence on the question of whether particular blood was the blood of a specified individual or whether particular bloodstains were made by a specified individual. (See cases collected and cited in 163 A.L.R. 939, 950-953; 46 A.L.R. 2d 1000, 1025-1027; 29 Am.Jur.2d 481, § 370.) The case of People v. Robinson, 27 N.Y.2d 864, 265 N.E.2d 543, relied upon by defendants and holding that such evidence is not admissible, is contrary to the weight of authority.[3/]

The rationale of the cases upholding the admissibility of blood grouping tests in

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3. Robinson involved type A blood. The evidence was held inadmissible because a large part of the population has blood of this type. This decision was criticized in a law review article by Jerome Price entitled "Evidence," 23 Syracuse L.Rev. 311, 326-327.

criminal cases is that such evidence is a link in the chain of circumstantial evidence tending to show guilt. (See 163 A.L.R. 939, 950.) We perceive such evidence to be admissible on the ground of relevancy as countenanced by the Evidence Code. Section 210 of the Evidence Code, in pertinent part, defines "relevant evidence" as ". . . evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." Section 351 of the Evidence Code provides: "Except as otherwise provided by statute, all relevant evidence is admissible." There is no statute proscribing the admissibility of blood grouping tests.

Defendants discuss at length cases involving the use of blood tests to prove or disprove paternity, contending that in such cases blood group evidence that excludes the possibility of parternity is admissible while that which only shows the possibility of

paternity is inadmissible. In considering this contention we first observe that the determination of paternity and the relevancy of the evidence based on tests is governed by statute. California has enacted a specific chapter of the evidence code known as the "Uniform Act on Blood Tests to Determine Paternity." (Evid. Code, §§ 890-897.) The act authorized the court to order the mother, child and alleged father to submit to blood tests. (§ 892.) It does not make the results of the blood tests inadmissible in evidence. To the contrary, it specifically provides that the experts who make the tests shall be called as witnesses to testify as to their findings and shall be subject to cross-examination by the parties. (§ 893.) The act does not proscribe admissibility of the tests but deals with the court's <u>determination</u> of paternity based on those tests. Section 895 provides: "If the court finds that the conclusions of all the experts, as

disclosed by the evidence based upon the tests, are that the alleged father is not the father of the child, the question of paternity shall be resolved accordingly. If the experts disagree in their findings or conclusions, the question shall be submitted upon all the evidence." (See Hodge v. Gould, 274 Cal.App.2d 806, 808.) In essence, section 895 deals with the weight to be given to the admissibility of blood tests and not to their admissibility in evidence. (See A.L.R.2d, §§ 12 and 13 at p. 1027.)

Defendants' contention that the admission of blood grouping tests contravenes the rule of People v. Collins, 68 Cal.2d 319, is without merit. Collins held it to be prejudicial error where the prosecution offered, through an expert, a formula in statistical probability from which the jurors were invited to infer that the odds against defendant's innocence were one in 12,000,000. The court found that the testimony itself

lacked an adequate foundation both in evidence and in statistical theory and that testimony and the manner in which the prosecution used it distracted the jury from its proper function. (At p. 327.) The deficiency recognized in the evidence proferred in Collins is not present in the case of blood grouping tests. The scientific basis and accuracy of these tests have been recognized by the courts and it is upon this recognition that, when a proper foundation is laid, the results of such tests are admissible in evidence on such questions as identity and paternity. (See Annotations on blood grouping tests in 163 A.L.R. 939 and 46 A.L.R. 2d 1000.)

Blood Donor Records

Defendants contend that it was error to permit the admission into evidence of blood donor records from the Alameda-Contra Costa County Medical Association Blood Bank. These records were introduced to show that

Officer Davis' blood type was not AB and thus that it was not his blood which was found on the knife and other articles associated with the murder. Defendants argue that the records were not admissible under the "business records" exception to the hearsay rule and that introduction of these records was violative of their Sixth Amendment right to confront witnesses.

The evidence was presented by Peter Rosendale, the technical director of the blood bank. He described the procedure employed by the blood bank in typing the blood of potential donors. Rosendale produced donor history cards of a Leo G. Davis. He also produced the "lab notes" or worksheets of the technicians who typed the blood. A sample had been tested on or about December 1, 1969. The interpretation from the results was that Davis had type O blood. The court admitted the evidence.

The business records exception to the hearsay rule is provided for in Evidence Code section 1271, which permits the introduction of evidence of a writing made as a record of an act, condition or event when offered to prove the act, condition or event if certain conditions are met. Defendants argue that this exception has no application to proof of a person's blood type.

In People v. Utter, 24 Cal.App.3d 535, 552-553, hqspital records relating to the blood type of the victim were held to come within the business records exception. Similarly, in People v. Williams, 187 Cal.App.2d 355, 367-368, the report of the results of a blood test showing absence of alcohol in the decedent's system was admissible as a business record. The cases relied upon by defendants where records were held to be inadmissible are cases in which the writing sought to be admitted was a record of the conclusion of the declarant

rather than the record of an act, condition or event.[4/] Most of these cases involve the record of a medical diagnosis.

In the instant case the evidence admitted was not a record of a conclusion or medical diagnosis. It was not based upon the "thought process" of the technician but rather upon the "mechanics of blood typing." (See People v. Utter, supra, 24 Cal.App.3d 535, 552-553.) The expert who testified stated that the results of a blood grouping

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4. In Hutton v. Brookside Hospital, 213 Cal.App.2d 350, 354-355, the court held inadmissible the record of a registered nurse's conclusion that the patient "seemed too ill to be moved." In People v. Terrell, 138 Cal.App.2d 35, 57-58, the court held inadmissible the notation in a hospital record of a diagnosis of a probable criminal abortion upon the rationale that the diagnosis was the reasoning of the person making it arrived at from the consideration of many factors. The same rationale was applied in People v. Reyes, 12 Cal.3d 486, 503, a cases involving a medical diagnosis, wherein it was observed that there was no opportunity to cross-examine the person making the diagnosis for the purpose of determining what factors led him to his conclusion and where he was qualified to make it.

examination case were considered to be an "interpretation." We are persuaded that since the results of a blood grouping examination are reached through mechanical procedures from which interpretations can be made, the record of such results are more akin to evidence of a condition than to a "conclusion." Accordingly, we conclude that records of a blood grouping made under the conditions prescribed in Evidence Code section 1271 are admissible under the business records exception.

Defendants argue that the Legislature has expressly determined that blood grouping results should be subject to cross-examination and are not within the business records exemption to the hearsay rule. Their authority for this contention is Evidence Code section 893, which is concerned with court-ordered blood tests to determine paternity. This statute directs that the court-appointed experts shall be subject to

cross-examination. Section 893 is clearly applicable to a specific situation and does not reflect in any way upon the question whether results of blood tests are admissible under the business records exception to the hearsay rule.

Adverting to the constitutional right of confrontation, we note that it has been recognized that certain exceptions to the hearsay rule do not violate the Sixth Amendment right to confrontation. (See People v. Brawley, 1 Cal.3d 277, 290 [cert. den., 400 U.S. 993] (extrajudicial statement of coconspirator); Tomlin v. Beto, 377 F.2d 276, 277 (official records of prior conviction); McDaniel v. United States, 343 F.2d 785, 789 [cert. den., 382 U.S. 826] (business records of a corporation).)

Defendants urge us to consider Kienlen v. United States, 437 F.2d 843, 848-849, and United States v. Partin, 493 F.2d 750, 763. These cases involved opinions

and conclusions recorded in hospital records, the admission of which in each case involved the accused's constitutional right to be confronted with witnesses against him. It should be noted that Partin held that the portions of the hospital records showing statements of the patient-witness, notation of symptons, and treatment rendered were admissible as factual data. (At pp. 763-764.)

Brawley, supra, has not been overruled by California v. Green, 399 U.S. 149, or Dutton v. Evans, 400 U.S. 74. Defendants take comfort in the statement in Green that ". . . we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception." (At pp. 155-156.) However, Green does not hold that the business records exception to the hearsay rule violates the confrontation clause of the Sixth Amendment. Green was concerned with the Evidence Code section 1235

which permits an inconsistent statement of a witness to be used as substantive evidence if the statement of a witness to be used as substantive evidence if the statement is otherwise admissible. The statute provides that such a statement is not made inadmissible by the hearsay rule. The constitutionality of section 1235 was upheld in Green. Defendants' reliance on Dutton is misplaced. That case held that a Georgia statute allowing into evidence as an exception to the hearsay rule a conconspirator's out-of-court statement made during the concealment phase of the conspiracy, was not unconstitutional or violative of the right to confrontation secured by the Sixth and Fourteenth Amendments. (400 U.S. at pp. 83, 87-88, 89.)

Pretrial Photographic Identification

A group of photographs was shown to both Herman Johnson and Charles Johnson. Herman Johnson was shown 18 photographs on

the day of the murder. He picked out photographs of defendants, but was unable to identify the third assailant. He was shown the same group of photographs twice more, with the same results. The same group of photographs was shown to Charles Johnson on July 23, 1971. He picked out defendants and Reginald Muldrew. Each of the photographs had imprinted on it the name of the person depicted. No attempt was made to mask the names when the photographs were displayed to the witnesses.

Defendants contend that the photographic identification was impermissibly suggestive in that the names were on the front of the photographs and that therefore the subsequent in-court identifications were tainted. (See Simmons v. United States, 390 U.S. 377; and Stovall v. Denno, 388 U.S. 293.) The thrust of this contention is that defendants were deprived of due process.

"A violation of due process occurs only when the pretrial procedure is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." (People v. Enos, 34 Cal.App.3d 25, 38; Neil v. Biggers, 409 U.S. 188, 199-200; Stovall v. Denno, supra, 388 U.S. 293, 302.)

In the present case the trial court conducted an extensive pretrial hearing on the propriety of the identification procedures at the conclusion of which it denied defendants' motion to suppress. This determination was tantamount to a finding that the pretrial identification procedures were fair. Under these circumstances the identifying witness may identify the defendant in the courtroom without the necessity of showing that the courtroom identification has an origin independent of the pretrial procedures. (People v. Rodriguez, 10 Cal.App.3d 18, 30-31; People v. Neal, 271 Cal.App.2d 826,

831-832 [cert. den., 396 U.S. 946]; People v. Douglas, 259 Cal.App.2d 694, 698.) "In such case the defendant may still offer before the jury such evidence of unfairness as he can produce. Such evidence affects the weight rather than the admissibility of the identification. [Citations.]" (People v. Rodriguez, supra, at p. 31.)

Our inquiry, therefore, is to determine whether as a matter of law the trial judge was required to make a determination that the pretrial identification was unfair so as to place the burden upon the prosecution to establish that the in-court identification will have an origin independent of the pretrial identification. (People v. Rodriguez, supra, 10 Cal.App.3d 18, 30-31; People v. Douglas, supra, at pp. 694, 698; see United States v. Wade, 388 U.S. 218, 239-242.)

The evidence adduced at the pretrial hearing disclosed that prior to the pretrial

photographic identification of defendants and Reginald Muldrew, Charles Johnson gave Sergeant Hankins the names of two of the persons whom he thought had been involved. He named one as "Justice" and one as "Reggie." Hankins, prior to showing Charles Johnson the photographs, did not give him the names of any individuals who might be involved. Charles Johnson then picked out from the group of photographs those of defendants and that of Muldrew. Defendants' objection is that Charles Johnson must have known by this time that defendant Gibson had been taken into custody. This assertion, however, is pure speculation as Charles Johnson denied that he knew at that time whether or not anyone had been taken into custody. It was his understanding that the suspects were still at large.

Herman Johnson testified that prior to the photographic identification he gave Sergeant Hankins appellant Gibson's name. He

did not give him Justice's name as he did not know it. He also testified that prior to being shown the group of photographs he was not told that either Gibson or Justice were suspected. Darrell Smith, who showed Herman Johnson the group of photographs, testified that prior to displaying them he did not indicate to the witness the names of any suspects. His testimony, however, does contradict that of Hermann Johnson in that Smith testified that Herman Johnson gave him the names of "Earl" and "Giggles" prior to the identification. "Giggles" is Justice's prison nickname.

The evidence adduced at the pretrial hearing produced a fact finding situation. The resolution of factual conflicts, if any, and the credibility of the witness were matters for the trial court. (See People v. Rodriguez, supra, 10 Cal.App.3d 18, 31-32.) The trial court was satisfied that the names on the photographs did not destroy the

reliability of the identification procedure. The court was apparently satisfied that the witnessses were unaware of the names of any suspects. Both witnesses denied such knowledge. Under the circumstances we perceive no error in the trial court's conclusion that the pretrial identification was fair.

We observe, moreover, that even if we were to assume that the trial court might have made an initial determination that the pretrial identification was unfair, its determination to permit the in-court identification was supportable on the basis that the in-court identification of defendants had an origin independent of such pretrial identification. In the instant case there is no substantial likelihood of misidentification. The testimony at trial indicates that the identification of defendants by Herman Johnson and Charles Johnson was based on their observance of defendants at the prison

hospital at or about the time of the homicide. Under the totality of the circumstances it cannot be asserted that defendants were deprived of due process because of an improper pretrial identification. (See Neil v. Biggers, supra, 409 U.S., 188, 199.)

Voir Dire of Juror Chapman

Defendants contend that the trial court should have granted their motion for a new trial on the ground that juror Beauford Chapman withheld relevant information on voir dire of Chapman, other prospective jurors were questioned whether they knew or were related to law enforcement personnel. On his voir dire Chapman was asked whether, from the questions asked of other jurors, anything was suggested to him that he felt he might want to comment upon. Chapman answered "No." He was then asked specifically, "You don't know any law enforcement related people?" Chapman did not give a direct "yes" or "no" answer, but stated a student with whom he went to

high school was a law officer in Marin County but that he was not a friend. Chapman was also asked whether in addition to his wife and children he had any immediate family that resided in the area. To this question Chapman responded: "My mother-in-law, and my father, and one sister, and two brothers, none of whom are in law, or police, or anything." Chapman was then passed for cause.

Defendants presented the affidavit of Juror Carol Rogiers which stated that, at some point subsequent to the court's introductory remarks and prior to Chapman's actual voir dire, Chapman commented to her "They'll never keep me, my father-in-law was a police officer in San Francisco."

In his affidavit Chapman stated he recalled making a statement in the jury room before the actual selection of the jury that his father-in-law had been a police officer and that he "may have speculated as to what effect this might have on my selection." He

stated that this reference was made in "a purely speculative sense" because he did not feel that the fact that his father-in-law had been a police officer would affect his ability to be fair and impartial. The affidavit states that his father-in-law had retired around 1959, one year after Chapman's marriage, and that he had died in 1967. The affidavit states that his father-in-law had never discussed the cases he worked on and never made any statements about his contacts or experiences in his police work. The affidavit states that Chapman felt that his association with his father-in-law would not affect his ability to be fair and impartial and for that reason he did not feel it "was a matter worth mentioning."

Affidavits of jurors may be used to set aside a verdict where the bias or disqualification of a juror was concealed by false answers on voir dire examination. People v. Castaldia, 51 Cal.2d 569, 572;

People v. Hutchinson, 71 Cal.2d 342, 346-348 [cert. den., 396 U.S. 994].) The question whether a new trial should be granted rests with the sound discretion of the trial court and its determination cannot be disturbed unless there has been an abuse of discretion. (People v. Grinnel, 257 Cal.App.2d 653, 663; People v. Starkey, 234 Cal.App.2d 822, 831.)

In the present case we cannot say that there has been an abuse of discretion in denying the motion for new trial on the ground of Chapman's failure to disclose his father-in-law's occupation. It was the trial court's function to weigh Chapman's credibility. In the exercise of that function the court specifically found that Chapman did not deliberately conceal his father-in-law's occupation. We also observe that no evidence was adduced that Chapman was prejudiced or biased or that he prejudged the case. The affidavit of Juror Rogier does not present any such evidence. Chapman's affidavit

denying bias or prejudice is sufficient to support a negative finding on that issue. (Clemens v. Regents of University of California, 20 Cal.App.2d 276, 284.)

In Castaldia, upon which defendants rely, two jurors gave false answers on their void dire examination. Substantial evidence was adduced that these jurors were biased and prejudiced against persons charged with the offense (bookmaking) for which the defendant was on trial. The judgment and order denying the motion for new trial was reversed because the reviewing court after examining the record which disclosed that the case was a close one, concluded that the misconduct of the jurors resulted in a miscarriage of justice. (51 Cal.2d at pp. 572-573.) Similarly, in Clemens, another case upon which defendants rely, there was substantial evidence of prejudice and prejudgment on the part of the juror accused of misconduct. In that case, a medical malpractice action, the

juror involved was a dentist, but when asked his occupation on voir dire he stated he was engaged in ranching and investment planning. He also stated that he had no bias or prejudice against malpractice litigation, would encourage it ina proper case, and that he had formed no opinion on the merits of the case. Affidavits of other jurors indicated that the juror told them he had not disclosed that he was a dentist because he would have been "kicked off" and contained statements indicating bias and prejudice on the part of the juror against the plaintiff and that he had prejudiced the issues. The reviewing court concluded, upon an independent review of the record, that since bias, prejudice and prejudgment were clearly proved, the plaintiff was deprived of his constitutional rights to a fair trial. (20 Cal.App.3d at pp. 366-367.)

We also find Clark v. United States, 289 U.S. 1, to be inapposite. In that case a

juror was found guilty of contempt for her intentional concealment on voir dire of her disqualification by previous employment by the defendant in a case where the jury was discharged because it was unable to agree, the single vote for acquittal being cast by the juror found to be in contempt. The concealment by the juror was specifically found to be wilful and deliberate and her statement on voir dire that she was free from bias was found to be a positive misstatement. The juror's bias was confirmed by her conduct in relation to her fellow jurors both during the trial and during deliberations. (At pp. 10-11.)

Defendants also contend that they were denied their absolute right to exercise a peremptory challenge. The declaration of attorney Glenn states that he would have exercised a peremptory challenge to excuse Chapman if he had been aware that Chapman's father-in-law has been a policeman. The

record discloses that defendants were each entitled to 25 peremptory challenges (Pen. Code., §§ 1070, 1070.5) and that between them they exercised only 14 challenges. Thus, they were not deprived of any right to exercise a peremptory challenge. Their undeveloped argument is a speculative one to the effect that they would have exercised a peremptory challenge with respect to Chapman had they known that his father-in-law had been a policeman.

Newly Discovered Evidence

In support of their motion for a new trial defendants filed the declarations of Franklin P. Glenn and Marvin Stender, their attorneys. Glenn's declaration stated that in pretrial discovery he learned that Jack Pierce, a San Quentin inmate housed in the cell adjacent to the corridor where Officer Davis was attacked, was an eyewitness to the attack. Pierce refused to answer any of Glenn's questions at a pretrial interview.

At a post-trial interview Pierce stated that he saw three assailants attack Davis: "that of the three one was 'a head taller' than the other two; that he was not certain of his tentative identification of Gibson as the tallest of the three assailants; but that Pierce was certain that neither of the two shorter assailants was Gibson." Glenn declared that had he known that Pierce could not definitely identify Gibson as the tallest of the three assailants he would have called Pierce to testify. His reasoning was that Pierce's testimony, coupled with that of Herman Johnson (who testified that Gibson was not the tallest of the three assailants), would have definitely established that Gibson was not one of the assailants. Glenn stated he could not have discovered this information before because of Pierce's refusal to talk to him.

The declaration of attorney Marvin Stender states that in a pretrial interview

with Pierce, Pierce described a conversation he had had the day before the attack on Officer Davis. This conversation was with an inmate whom Pierce described ". . . as a short, muscular, black inmate who walked with a limp and who worked in the prison hospital linen room." This description, the declarant alleges, fits only Justice. In the same interview, Pierce stated that the above described inmate was not one of the three assailants. Following this interview Stender approached Pierce on a street corner adjacent to Pierce's home for the purpose of showing Pierce a photograph of defendant Justice. However, before he was able to do so, Pierce was called to answer a telephone call. Pierce did not return to resume his conversation with Stender.

Stender declared, further, that in a post-trial interview Pierce told him that the telephone call which had terminated the previous interview was from a Mr. Beckwood, an

investigator for the California Department of Corrections, and that Beckwood had told him to discontinue his conversation with Stender. The declaration stated that at this post-trial interview Pierce, for the first time, stated that on on prior occasion had he interpreted anything which Stender had done or said as a threat. Stender delcared that he had known prior to the conclusion of the trial that Pierce no longer claimed that Stender had threatened him, he would have called Pierce as a witness on behalf of defendant Justice.

Pierce refused to give either of defendants a post-trial affidavit.

At an evidentiary hearing prior to trial on the issue of the propriety of the identification procedures, Jack Pierce testified that he was an eyewitness to the attack on Officer Davis. Approximately 30 to 45 minutes after the attack he was shown a group of photographs. He recognized the

persons, but he refused to pick them out as he did not want to become involved at that time. He was released on parole on August 6, 1971, and on that date was again shown a set of photographs. He identified defendants and Muldrew. He also testified as to a conversation with attorney Stender during which he alleged that Stender impliedly threatened him. Both attorney Glenn and attorney Stender cross-examined Pierce at length. Pierce did not testify at the trial.

The trial court denied the motion for new trial on the ground of newly discovered evidence with the observation that ". . . Mr. Pierce's anticipated testimony based upon his pretrial testimony is not the type of evidence that can properly be regarded as a basis for a motion for new trial."

Penal Code section 1181, subdivision 8, provides that a new trial may be granted "When new evidence is discovered material to

the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial. . . ." To entitle a party to a new trial on the ground of newly discovered evidence it must appear that the evidence, and not merely its materiality, be newly discovered; that the evidence is not merely cumulative; that a different result must be probable on a retrial of the cause; that the party could not with reasonable diligence have discovered and produced it at trial; and that these facts be shown by the best evidence which the case admits. (People v. McGarry, 42 Cal.2d 429, 433; People v. Sutton, 73 Cal. 243, 247-248; People v. Warren, 175 Cal.App.2d 233, 245.)

The claim of newly discovered evidence warranting a new trial is looked upon by the courts with distrust and disfavor, and, unless a clear and unmistakeable abuse of discretion is shown, the action of the trial court will not be disturbed on appeal.

(People v. Williams, 57 Cal.2d 263, 270.)

It is apparent from the affidavits of Glenn and Stender that they were aware that Pierce was a potential witness. They had attempted to interview him before trial and they knew before the trial that Pierce had testified at the pretrial evidentiary hearing that defendants were among Officer Davis' assailants. Counsel for both defendants were aware of the testimony that Pierce would give if called as a witness. Although Glenn's declaration states that he could not have discovered the evidence favorable to Gibson because of Pierce's refusal to talk to him, he did cross-examine Pierce at length at the pretrial evidentiary hearing. With respect to defendant Justice, the asserted newly discovered evidence was known to Stender, his attorney, prior to trial. What he claims to be newly discovered is that Pierce no longer claimed that he had been threatened by Stender. We observe here that,

in connection with his motion for a new trial, Stender stated that he and attorney Glenn had considered calling Pierce as a witness on several occasions but did not do so because of Pierce's allegations at the retrial hearing that Stender had threatened him.

The trial judge was justified, moreover, in concluding that the testimony of Pierce would be merely cumulative and that it would not have rendered a different result on retrial of the case. There is nothing to indicate that Pierce would have varied his testimony substantially from that given at the pretrial hearing. The trial court was of the opinion that there was nothing in the declaration that gave any indication that Pierce's testimony would be so favorable to the defense that it could reasonably be expected to change the result.

As respects the alleged misconduct of the prosecution having to do with the

alleged interference by investigator Packwood as constituting newly discovered evidence, the court was not furnished with any affidavit by Pierce that he had been interfered with in the fashion alleged. It appears from the record that the court had before it (although not included on the record on appeal) an affidavit by Pierce taken by the Department of Corrections in which he denied that anyone from that department had ordered him not to talk.

There was, therefore, no abuse of discretion in denying the motion for a new trial on the grounds of newly discovered evidence.

Misconduct of Jurors

Defendants contend that the trial court erred in not granting a new trial on grounds of jury misconduct in that members of the jury conducted library research on matters not presented in evidence. Two jurors researched two areas of the case and

reported the results of their research to their fellow jurors.[5/]

Juror Colin F. Grist admitted that he consulted an encyclopedia in order to discover how rare AB type blood is in the general population and obtained the information that it was a rare blood type. He believed, but was not certain, that this was done after the jury had finished balloting on defendant Justice. He had some recollection, but not certain, that he might have mentioned to another juror that AB type blood was rare.

Jurors Chapman, Gauger, and Cox recalled the statement. Of the nine jurors polled, four recalled the statements, and the affidavits of these jurors indicate that the

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5. This conduct was established by affidavits filed to impeach their verdict on the basis that the jury's verdict was improperly influenced by conduct consisting of overt acts, which are objectively ascertainable, i.e., influence open to sight, hearing and other senses and thus subject to corroboration. (Evid. Code, § 1150; see People v. Hutchinson, supra, 71 Cal.2d 342, 349-350.)

comment was a brief one and that it prompted an admonition from other jurors that evidence of the rarity of AB type blood was not properly in evidence.

In her original affidavit juror Mona Gauger stated that during deliberations she consulted a medical encyclopedia at the request of her fellow jurors to determine the effect on perception of the amount of morphine given to prosecution witness Ivan Kranzelic. Her research confirmed her belief that the dosage given Kranzelic was relatively small and would not have rendered him stuperous or completely unable to perceive events taking place around him. She related this information to the other members of the jury.

In her second affidavit Gauger further explained that during deliberations concerning Kranzelic's testimony she commented on the dosage of morphine given Kranzelic and some members of the jury said

that she "should be sure." She interpreted this as a request to look up the information. She recalled that at some point a juror commented that since no evidence had been produced as to the effect of morphine that they could not consider it.

Juror Chapman recalled Gauger's statement and recalled that he and possibly another juror stated that this information was not evidence produced in court and that therefore it could not be considered by them. The subject was then dropped. Juror Grist recalled Gauger's comment about a morphine dose but had no recollection of the specific nature of the comment. Foreman Lubersky recalled that Gauger had stated that she had consulted a medical reference book and that the amount of the drug administered was a minimal dosage and that the effect was to increase perception and imagination for a couple of hours and give the patient a felling of well-being. Gauger's remarks

lasted no more than a minute. Juror Taylor recalled that Gauger had said that she looked something up in a book and said: ". . . something to the effect that depending on a man's weight that the dose given wouldn't hurt his ability to see or hear." He recalled that two jurors, one being Chapman, commented that this was not in evidence and that they should not be concerned with it. Juror Cox recalled that Gauger said that the dosage of morphine could have either dulled or sharpened Kranzelic's powers of observation a little. Juror Storey stated that Gauger had said that in some cases perception would be heightened while in others the recipient would be made drowsy. She recalled that foreman Lubersky commented that this should not be considered as it was not in evidence and that she herself commented that this information had no value or validity. Juror Michael recalled a statement by Gauger that morphine hinders the imagination and

and further recalled that Lubersky stated that they could not consider this as evidence. Juror O'Brien did not recall Gauger's comment. Juror Mraz recalled that Gauger stated that morphine might make a person more alert and recalled Lubersky's admonition.

The jurors did not request that Gauger reserach the subject. Furthermore, the jurors received prompt admonitions that the matter should not be considered as it was not presented in evidence and the discussion was very brief, lasting perhaps only a minute.

The jury received no evidence in court as to the rarity of AB type blood or the effect of the dosage of morphine on Kranzelic.

The trial judge found that the conduct of jurors Grist and Gauger constituted misconduct, but determined, upon an application of the test prescribed in People v. Watson, 46 Cal.2d 818, 836 [cert. den., 335

U.S. 846], that it was not reasonably probable that a result more favorable to defendants would have been reached in the absence of the misconduct. The trial judge, in making his determination, declared that if he were applying the federal test articulated in Chapman v. California, 386, U.S. 18, he would have been compelled to reach a different result. Chapman holds that where prejudicial error occurs the judgment must be reversed unless the reviewing court can declare a belief that the error was harmless beyond a reasonable doubt. (At p. 24.)

The conduct of the two jurors was clearly misconduct. The out-of-court reception of evidence is misconduct of a serious nature. The People do not dispute that the jurors acted improperly but urge that it constituted harmless error under the Watson test applied by the trial judge. Defendants contend that the jurors' conduct constituted error which is reversible per se. The trial

court specifically determined that the error was not reversible per se.

Before proceeding to discuss the legal issue presented it is necessary to ascertain the importance of the two items of evidence which were injected into the jury's deliberations as the result of the misconduct. Defendants assert that the rarity of AB type blood was at the heart of the prosecution's case and point out that in his argument the prosecutor labeled it as Justice's "calling card."

Evidence was received at trial that Officer Davis' blood type was 0, that Gibson's blood type is also type 0, while Justice's blood type is AB. Evidence was also received that AB type blood was found on the weapon asserted to be the murder weapon, on a pair of denim pants found in room 224, on a roll of toilet paper taken from a fourth floor trash can, on a white jacket taken from the soiled linen hamper, and on Gibson's

bedding.

Regarding the effect of morphine on Kranzelic, there is no question but that Kranzelic was a vital prosecution witness. He had undergone surgery two days before the events to which he testified occurred. On July 21, 1971, he received three separate shots of morphine from midnight up until noon. No evidence was offered as to the probable effect of Kranzelic's morphine dosage on his perceptions but both sides drew some inferences at trial.

The cases which hold the error requires a reversal without regard to whether the reviewing courts can declare that under the state of the evidence the error is hamrless are restricted to cases dealing with the erroneous admission of confessions or in cases in which the trial was fundamentally unfair. (People v. Bostick, 62 Cal.2d 820, 824.) In other situations error which constituted a denial of due process or a

violation of some other constitutional right has been held not to be reversible per se because it was nonprejudicial. (People v. Bostick, supra.) As observed in Chapman, ". . . there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." (386 U.S. at p. 22.)

The admission or exclusion of evidence in violation of the common law and statutory rules usually treated as procedural error which calls for a reversal of the judgment only if a miscarriage of justice resulted. (See Cal. Const., art. VI, § 13.) It has also been held that illegally obtained evidence does not constitute reversible error per se. (People v. Parham, 50 Cal.2d 378, 384 [cert. den., 377 U.S. 945]; see People v. Tarantino, 45 Cal.2d 590, 596.) In the

instant case the reception by the jury of unauthorized evidence was akin to the admission of inadmissible evidence. Moreover, the unauthorized reception by the jurors of new evidence through their own efforts has been held to be reversible error only when it resulted in a miscarriage of justice and hence, not reversible error per se. (See People v. Tedesco, 1 Cal.2d 211, 221; People v. Rowell, 133 Cal. 39, 41; People v. Tuqwell, 32 Cal.App. 520, 522-523; People v. Yee King, 24 Cal.App. 509, 513; see also People v. Terry, 2 Cal.3d 362, 397 [cert. den., 406 U.S. 912]; People v. Lambright, 61 Cal.2d 482, 486.) Jury misconduct merely raises a presumption of prejudice. (In re Winchester, 53 Cal.2d 528, 534-535 [cert. den., 363 U.S. 852].)

Defendant's reliance on Turner v. Louisiana, 379 U.S. 466, Estes v. Texas, 381 U.S. 532, and Parker v. Gladden, 385 U.S. 363, is misplaced. In each of these cases

the court found inherent or extrinsic pressure in the particular conduct so as to deprive the defendant of a fair trial.[6/] The particular misconduct in this case does not rise to that level.

Adverting to the question whether the error was subject to the Watson or the Chapman test, we note the threshold requirement that we must determine whether the

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6. In Turner, extreme prejudice was found in the continual association in the trial between the jurors and two deputy sheriffs who were shepherding the jury and who were also crucial witnesses in the case. (379 U.S. 466, 472-473.)

In Estes, the televising of a criminal trial was held to be inherently invalid as infringing on the right of a fair trial guaranteed by the Due Process Clause of the Fourteenth Amendment. (381 U.S. 532, 536-552.)

In Parker, a bailiff assigned to shephard a sequestered jury told one juror that defendant was guilty and another that if there was anthing wrong with finding defendant guilty the Supreme Court would correct it. This conduct was held to be violative of the right to an impartial trial and the right to be confronted by witnesses as guaranteed by the Sixth and Fourteenth Amendments. (385 U.S. 363.)

error is one which may properly be characterized as federal constitutional error. If it is, the Chapman test applies. Defendants contend that the jury's reception of evidence out of court violates the confrontation clause of the Sixth Amendment and the right to a trial by jury guaranteed by that amendment.

The People's reliance on People v. Lambright, supra, 61 Cal.2d 482, and People v. Castaldia, 51 Cal.2d 569 is not determinative. In both cases the Watson test was applied. Castaldia does not involve the unauthorized reception of new evidence but the giving of false answers on voir dire. Lambright involved the refusal to permit the jurors to be polled as to whether they had read an article in a newspaper reporting that the defendant had threatened to kill the victim. In any event, both cases were decided prior to Chapman.

In People v. Dacy, 5 Cal.App.3d 216, 221-222, a juror remarked to some of the other jurors during a break in their deliberations that the defendant had an arrest record. In that case the trial judge refused to grant a mistrial on the basis that he had instructed the jury before it retired that it was not to consider anything outside the evidence, and that, when the jurors were queried about the incident after they had reached a verdict on the charges but prior to deliberating on the penalty phase, they stated to the judge that they had heeded the admonition and would continue to do so. The reviewing court observed that if it could be assumed that the incident could be regarded as procedural error it would be regarded as nonprejudicial error which did not result in a miscarriage of justice under California Constitution article VI, section 13 (the Watson test). The court also observed that the evidence against defendant was

"overwhelming" and it is "inconceivable" that the jury could have disbelieved it. (At p. 222.)[7]

In People v. Lessard, 58 Cal.2d 447, 454, the defendant contended that the jurors were guilty of misconduct in receiving evidence out-of-court. An affidavit of a juror who was excused because of illness before the matter was submitted to the jury stated that ". . . another juror read an inaccurate account of the trial in a newspaper, discussed the same with other jurors and based her premature opinion of defendant's guilt upon such newspaper article." The affiant also alleged the other jurors formed premature opinions of the defendant's guilt.

The court stated that "There can be no doubt that the reading by jurors of newspaper accounts of a trial in which they are

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7. No petition for a hearing in the Supreme Court was filed in Dacy.

engaged amounts to a violation of their duty and obligation and if such newspaper accounts would be at all likely to influence jurors in the performance of duty, the act would constitute a ground for a motion for a new trial." (At p. 454). After noting that jurors in a criminal action subscribe to an oath to render a true verdict according to the evidence (Code Civ. Proc., § 604), the court stated: "Under the oath which they take they cannot without a violation thereof receive impressions from any other source. However, the crucial question is whether it can be proved as a fact or may be presumed as a conclusion of law that the verdict of the jury may have been influenced by information or impressions received from sources outside of the evidence in the case." (At p. 454.)

The reviewing court in Lessard was satisfied that the trial judge had not erred in denying the motion for new trial and in

refusing to indulge the assumption that the jurors violated their oaths and disregarded his admonitions given throughout the trial. It considered the affidavit of the foreman of the jury in which he stated that he did not hear any jurors discuss the guilt of the defendant before deliberations and that he did not hear any expressions of prejudice.

It is apparent that Lessard did not consider the alleged misconduct of the jurors in the context of the harmless error rule, or whether error of a constitutional dimension was involved, but that it treated the question presented as one involving whether the trial judge abused his discretion. It is obvious, however, that the court did not consider the misconduct asserted to constitute prejudicial error per se.

Defendants acknowledge that all instances of jury misconduct do not rise to the level of federal constitutional error.

They place their reliance, however, on United States v. Howard (5th Cir. 1975) 506 F.2d 865, and Jackson v. Hutto (8th Cir. 1975) 508 F.2d 890. In Howard a juror filed an affidavit in support of a motion to stay execution and grant a new trial in which he stated that during the jury's deliberations one juror had stated that the defendant had been in trouble a few times and that this fact was used to pressure the affiant and another juror into aligning with the rest of the jury on a guilty verdict. The federal district court denied the motion without a hearing. The appellate court vacated the lower court's order and remanded the cause for an inquiry into the accuracy of the affidavit and to consider whether there was any reasonable possibility of prejudice to the defendant. Howard does not hold that the misconduct complained of is of federal constitutional dimension but only that the trial court

consider the affidavit and any prejudice under the Chapman rule which the district court, as a federal court, was required to follow irrespective of whether the misconduct was of federal constitutional dimension.

In Hutto the trial judge, in the absence of defendant, orally communicated with the jury on several occasions during the jury's deliberations. The reviewing court found that defendant's contention raised an issue of constitutional significance but proceeded to find that the record disclosed the absence of prejudice.

Hutto does not involve the reception of unauthorized new evidence by jurors but rather involves reception of oral communications with the jury on several occasions during jury deliberations. The communications consisted of response to inquiries on the law and the rereading of instructions. These communications were made in the absence

of the defendant. The reference in the opinion in Hutto to the issue of constitutional significance does not relate to the communications made by the judge to the jury per se but to the fact that it was made in the absence of the defendant and that the constitutional right infringed upon was the defendant's right to be present at every stage of his trial. (508 F.2d at p. 891.)

In view of the foregoing we conclude that the type of misconduct indulged in by juror Grist and Gauger constituted procedural error subject to the test enunciated in People v. Watson, supra, 46 Cal.2d 818, 836. We proceed to apply the test to such misconduct.

We first observe that with respect to the comment of juror Grist as to the rarity of AB type blood, juror Storey, who did not recall Grist's comment, recalled that she herself had stated that AB type blood was rather rare but at the same time emphasized

that evidence as to the rarity of AB type blood should not be considered since no evidence had been presented as to how many inmates at San Quentin had AB type blood. Juror Michael stated she recalled Storey's comment. Juror Mraz stated she was already aware that AB type blood was rare.[8/]

The affidavits of the jurors clearly indicate that the two jurors who conducted the outside research were promptly admonished by the other jurors that such evidence was not presented in the court and therefore was not to be considered by them in reaching their verdict. The jury was instructed by the court that it must be governed solely by the evidence received at the trial. The affidavits do not disclose that the jury

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8. The basis of juror Mraz's knowledge does not appear in the record. Jurors may, in weighing the evidence, exercise their own general knowledge of the subjects at hand. (Baker v. Borello, 136 Cal. 160, 167; Dyas v. Southern Pacific Co., 140 Cal. 296, 309; see Wiley v. Young, 178 Cal. 681, 687.)

considered the evidence received out of court in reaching their verdict. The prompt admonitions from the other jurors suggest that they did not.

In the instant case, as was the situation in Lessard, it cannot be proved as a fact nor may it be presumed as a conclusion of law that the verdict of the jury may have been influenced by information or impressions received from sources outside of the evidence in the case. We accordingly conclude, after a consideration of the entire case, including the evidence, that it is not probable that a result favorable to defendants would have ensured in the absence of the misconduct of jurors Grist and Gauger. Since we are in accord with the trial judge that the misconduct of said jurors constituted harmless error under the Watson test, the trial judge did not abuse his discretion in denying the motion for a new trial on the ground of jury misconduct.

The judgment is affirmed.

Molinari, P.J.

WE CONCUR:

Sims, J.

Elkington, J.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-1339

THOMAS L. CLANON, Petitioner

vs.

EARL B. GIBSON, Respondent.

GEORGE SUMNER, Petitioner,

vs.

LAWRENCE JUSTICE, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-1339

THOMAS L. CLANON, Petitioner,

vs.

EARL B. GIBSON, Respondent.

GEORGE SUMNER, Petitioner,

vs.

LAWRENCE JUSTICE, Respondent.

ON PETITIONER FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The respondents Earl B. Gibson and Lawrence Justice respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 633 F.2d 851.

JURISDICTION

Respondents accept petitioners' statement of jurisdiction in this case.

QUESTION PRESENTED

1. Whether this Court should grant certiorari to review a factual finding by a federal court of appeal assessing the prejudicial impact of a concededly constitutional error, when that determination is fundamentally grounded upon the explicit factual finding of the state criminal trial judge, unchallenged by the reviewing state courts, that in light of the prosecution evidence the error could not be considered harmless

beyond a reasonable doubt.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment XIV, Section 1: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law. ..."

The United States Constitution, Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him; ... and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

Respondents accept petitioners' description of the procedural history of the case. Respondents offer the following statement of facts relevant to the constitutional issue raised in this case, which is taken from the text of the opinion of the Court of Appeals for the Ninth Circuit, which appears as Appendix A to the Petition for Writ of Certiorari:

> On July 21, 1971, Leo Davis, an unarmed guard at the San Quentin prison hospital, was stabbed to death. The state's case linking Gibson and Justice to the crime was based principally upon the testimony of three witnesses and the introduction of certain physical evidence.
>
> The state's chief witness was Herman Johnson who testified that he was an eyewitness to the killing. On July 19, 1971, Johnson claimed he was stabbed in the neck by Gibson and Justice shortly after he had been transferred to San Quentin from Soledad. The attack was allegedly provoked by Johnson's willingness to give a statement implicating other inmates in a crime at Soledad. After the attack, Johnson was placed in a room on the second floor. Davis was stationed in the hallway outside his door.
>
> According to Johnson, at around noon on July 21 he

caught a glimpse of Gibson through a window in the door to his room and heard scuffling. He testified that upon going to the door he was able to see Gibson and Justice stab Davis while a third man held him.

The defendants impeached Johnson's testimony with the testimony of other inmates who stated that they had witnessed the July 19 attack on Johnson, and Gibson and Justice were not among the attackers. The defense implied that there was a possibility that Johnson's testimony was biased because a decision on a parole violation committed by Johnson was allegedly held in abeyance until after his testimony at the trial. The defense also introduced evidence indicating that Johnson had a poor reputation for veracity.

Johnson's eyewitness account was corroborated by two other prosecution witnesses. Another inmate with the last name of Johnson, Charles Johnson, testified that he had seen Gibson, Justice and a third man in a shower room on the second floor of the hospital within a short time of when the murder occurred.

There was also testimony from Ivan Kranzelic who shared a hospital ward on the fourth floor with Gibson. Gibson had gained admittance to the hospital after allegedly suffering an injury in football practice the day before the murder. Kranzelic testified that on the morning of July 21 he had seen an inmate give a prison-made knife to Gibson, who in turn gave it to Justice. Kranzelic overheard Gibson make various statements such as they would have to do "it" that day. Around noon Gibson, Justice, and a third inmate left the ward and returned about twenty minutes later. Kranzelic testified that Justice's hand was bleeding when he returned and, as he sat on Gibson's bed, he used a roll of toilet paper to try to stop the bleeding. At the time these events

were alleged to occur Kranzelic was recovering from foot surgery and had been given several doses of morphine.

At trial the state introduced evidence showing that the murder victim had blood type "O." Justice had blood type "AB." It was further shown that the blood stains found on the murder weapon, on Gibson's bed where Justice had sat, and on the roll of toilet paper, which was also recovered, all were of blood type "AB."

The trial lasted from December 1972 until April 1973. The jury deliberated for two and a half days before returning a guilty verdict on April 18, 1973. A month later, on May 17, 1973, Gibson and Justice made a motion for a new trial on the grounds that the jury had impermissibly relied upon evidence not produced in court. Affidavits submitted by the jurors reveal two incidents of misconduct.

At one point during the deliberations, Juror Colin Grist went to an encyclopedia to confirm his belief that blood type "AB" was rare. He reported his findings back to other members of the jury. Jurors Chapman, Gauger and Cox remembered some comment by Grist. Grist was unsure whether he made the comment before or after the balloting on Justice.

Another juror, Mona Gauger, stated that while the jury was considering Kranzelic's testimony she had commented on the dosage of morphine. Other jurors were unsure what effect the morphine may have had on Kranzelic, which Gauger interpreted as a request for more information. She then consulted a medical encyclopedia from which she apparently concluded that the morphine dosage was too small to have affected Kranzelic's perceptions. At least eight other jurors remembered some comment by Gauger, but there was some disagreement as to exactly what she had said.

In both cases there were apparently some comments in the jury room to the effect that the jury should not consider this evidence.

The trial judge denied the motion for a new trial. In his oral ruling the judge considered the applicable test to be that of People v. Watson, 299 P.2d 243, 254 (Cal. 1956), cert. denied 355 U.S. 846 (1957), which, in the courts of California, requires reversal for an error when it is "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (Emphasis added.) The judge specifically declined to apply the stricter test of Chapman v. California, 386 U.S. 18, 24 (1967), which requires, in the case of federal constitutional errors, that the error be harmless "beyond a reasonable doubt."

In his ruling, the judge twice indicated that were he to apply the Chapman standard, he would have granted the motion:

> I will state for the record that I cannot say that it [the jury misconduct] was harmless beyond a reasonable doubt.
>
> . . . .
>
> . . . . I don't think the Chapman case applies to this situation. If it does and I were to apply it, I would feel, I think, compelled to reach a different result.

The trial judge's decision was affirmed by an unpublished opinion of the California Court of Appeal. Petitions for certiorari to the California Supreme Court and the United States Supreme Court were denied. In denying the petitioners' subsequent writ of habeas corpus, the federal district court judge did not specifically decide whether the jury misconduct in this case amounted to constitutional error, but concluded that if there were constitutional error it was harmless beyond a reasonable doubt.

REASONS WHY THE WRIT SHOULD BE DENIED

The Decision of the Court of Appeals Must Be Upheld Because it Expressly Conforms to the Recent Mandate of This Court Requiring Deference to the Factual Determinations Made by State Courts.

Petitioners complain that the decision of the Court of Appeals granting habeas corpus relief is not merely erroneous but "tragic," and impliedly suggest that the decision is contrary to the dictates of this Court. It is clear, however, that the decision is neither erroneous nor tragic, but is virtually compelled under the law.

The record of respondents' trial discloses two instances of clear misconduct by the trial jury in obtaining extrinsic evidence during deliberations. None of the five courts who have considered the matter have questioned that this was error, nor have petitioners contended otherwise in the habeas corpus proceedings in the District Court or the Court of Appeals.

Rather, the issue around which the resolution of the instant case has revolved from the outset has been the proper legal standard by which the prejudicial impact of the error is to be measured and the application of that standard to the record below. The confusion in the record upon which petitioners now seek to capitalize is the product of the inconsistency in the positions they have taken on these issues before the courts which have previously considered the instant case.

In the state trial court, the prosecution opposed the motion for new trial made by defendants Gibson and Justice (respondents herein) on the grounds of jury misconduct by contending that the misconduct was to be judged by the "miscarriage of justice" standard of People v. Watson, supra, appropriate to non-constitutional errors. The trial judge accepted the prosecution's contention, and denied the motion for new trial under this standard, concluding that it was not "reasonably probable" that a

different verdict would have resulted had the errors not been committed. However, the state trial judge, who had presided over the lengthy trial for more than four months, observing the witnesses and their demeanor and watching the evidence unfold before him rather than merely reading it in a cold record, twice made clear for the record that his ruling was contingent upon the correctness of the determination that the error was not one of constitutional dimension. As noted above, he made and reiterated the factual determination that the error could not be found harmless beyond a reasonable doubt if that standard were to be applied to the evidence

The convictions, and consequently the denial of the motion for new trial, were appealed to the state Court of Appeal, which affirmed, and review was sought before the state Supreme Court, which denied a hearing. These rulings upholding the trial court's determination were also expressly based on the determination that the error complained of was not constitutional, and did not require the application of the "harmless error" rule enunciated in Chapman v. California, supra. (Petition, Appendix C, p. 86) Indeed, the extensive discussion of the issue by the state Court of Appeal (Id. at 67-88) in itself makes clear that the Court of Appeal considered the resolution of this question as dispositive of the issue, and thus by clear implication concurred in the opinion of the trial judge that the errors could not be found harmless under the federal consitutional standard. Nothing in the proceedings resulting in the denial of a hearing by the state Supreme Court suggests any alternative view of the record therein.

Thereafter, upon respondents Gibson and Justice's petition for habeas corpus in the United States District Court, the prosecution (represented by Petitioners herein) virtually abandoned any serious contention that the error was not of constitutional dimension. Rather, the United States District Court was urged to make an "independent review" of the massive trial record

and to determine, for the first time, that the conceded instances of jury misconduct were harmless beyond a reasonable doubt. Despite the explicit findings of the state trial judge, the United States District Court purported to make such a review and to declare the errors harmless.

Thus, in contrast to petitioners' attempted reconstruction of the procedural history of the matter (Petition, pp. 32-33), all but one of the courts who have expressed an opinion on the matter have concluded, as urged by respondents and decided by the Ninth Circuit Court of Appeals, that the proven jury misconduct could not be found harmless beyond a reasonable doubt under the Chapman standard. These courts have differed only on the purely legal question of whether the Chapman test was necessarily to be applied. Only one court that has considered the matter, and only one judge, has purported to make a contrary factual finding, and has attempted to characterize the error as constitutionally harmless. But in so doing the District Court acted contrary to the teachings of this Court in attempting to substitute its factual determination for that made by the state courts. Cf., Sumner v. Mata (1981) 66 L.Ed. 2d ___, 49 U.S.L.W. 4133.

In their petition, as before the Court of Appeals, petitioners concede the principal question of law, and do not dispute that the jury misconduct must be considered federal constitutional error. (Petition, pp. 33-34) This concession is entirely appropriate. As set forth by the Court of Appeals, the recognition that the jury misconduct resulted in violation of the constitutional right to confront and cross-examine witnesses is compelled by the decisions in, inter alia, Turner v. Louisiana (1965) 379 U.S. 466; Parker v. Gladden (1966) 385 U.S. 363; and United States v. Vasquez (9th Cir., 1979) 597 F.2d 192.

Rather than presenting a substantial question of law, petitioners thus ask this Court to review what is essentially a

purely factual determination. This request for review must be denied for three reasons.

First, it is well settled that this Court does not ordinarily "grant a certiorari to review evidence and discuss specific facts." United States v. Johnston (1925) 268 U.S. 220, 227. In the absence of an obvious and exceptional error in the apprehension or application of the standard involved, this Court will not, and should not intervene. See, e.g., Graver Manufacturing Company v. Linde Company (1949) 336 U.S. 271, 275; Mobil Oil Corp. v. F.P.C. (1974) 417 U.S. 283, 310. Such circumstances are not presented by the instant record in which there is no dispute as to the standard to be applied, and all but one of the several courts which have considered the factual issue have made the same determination as that presently challenged by petitioners.

Second, contrary to petitioners' attempted characterization, the Court of Appeals decision is entirely consistent with the principles of federalism and sound administration of justice recently articulated by this Court in Sumner v. Mata, supra. That decision requires not blind adherence to the results reached by state courts regardless of their merits, but a substantial deference to factual determinations made by state courts upon evidence presented therein. Thus, federal courts retain a strong mandate to ensure the correct understanding and application of principles of constitutional law in the state courts, but may not substitute their assessment of the facts for that of the state court in applying the proper standards. The Court of Appeals herein performed its mandated function, and no more.

As presented to the Court of Appeals, there was no dispute that the state trial court and reviewing courts had applied the wrong constitutional standard, and that is again conceded here. This concession having been made, the Court of Appeals reached the decision which would now be mandated under

Sumner v. Mata, supra, and upheld the factual determination of the state courts that the error could not be viewed as harmless. It is difficult to understand the basis upon which petitioners now urge that the Court of Appeals should have done otherwise.

Third, and perhaps most importantly, the factual determination reflected in the Court of Appeals' opinion should not be disturbed because it is plainly correct. In the instant case, unlike the situation addressed in Harrington v. California (1969) 395 U.S. 250, 254, there is no need to speculate upon "the probable impact of the [error] on the minds of an average jury." Here the jury itself has answered that question by undertaking the very actions which respondents challenge. Whatever might be the purported result of an "independent" review of the record, the undisputed fact that several members of the jury which convicted respondents felt it necessary to take the extraordinary step of obtaining extrinsic evidence on significant factual issues prior to returning a verdict leaves no room for serious argument, let alone certainty beyond a reasonable doubt, that the impropriety may have affected the verdict. The constitutional infirmity of respondents' convictions is thus plainly established.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

DATED: March 3, 1981

Respectfully submitted,

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Attorneys for Earl B. Gibson

By _____
DORON WEINBERG

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

No. 80-1339

THOMAS L. CLANON, Superintendant,	)
	)
Petitioner,	)
	)
vs.	)
	)
EARL G. GIBSON,	)
	)
Respondent.	)
	)
GEORGE SUMNER, Superintendent,	)
	)
Petitioner,	)
	)
vs.	)
	)
LAWRENCE JUSTICE,	)
	)
Respondent.	)

CERTIFICATE OF SERVICE BY MAIL

DORON WEINBERG, a member of the Bar of the Supreme Court of the United States, states:

That his business address is 396 Hayes Street, Suite 2 in the City and County of San Francisco, State of California; that on March 5, 1981, he served a true copy of attached Respondent's Brief in Opposition to Petition for Writ of Certiorari on each of the following, by placing same in envelopes addressed respectively as follows:

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6000 State Building
San Francisco, CA 94102

Clerk, U.S. District of Northern California
U.S. Courthouse
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San Francisco, CA 94102

Clerk, U.S. Court of Appeals of the Ninth Circuit
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Jerry Herman, DISTRICT ATTORNEY
Joshua Thomas, ASSISTANT DISTRICT ATTORNEY
Marin County Civic Center
San Rafael, CA 94903

Said envelopes were then sealed and deposited in the United States Mail at San Francisco, California with the postage thereon fully prepaid.

DORON WEINBERG

RECEIVED
MAR 6 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

No. 80-1339

THOMAS L. CLANON, Superintendent,
Petitioner,
vs.
EARL B. GIBSON,
Respondent.

GEORGE SUMNER, Superintendent,
Petitioner,
vs.
LAWRENCE JUSTICE,
Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Respondents, Earl B. Gibson and Lawrence Justice, by and through their counsel, ask leave to file the attached Respondents' Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of California without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The affidavits of Respondents in support of this motion is attached hereto.

March 2, 1981

DORON WEINBERG
Counsel for Respondents

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-1339

THOMAS L. CLANON, Petitoner,

vs.

EARL B. GIBSON, Respondent.

GEORGE SUMNER, Petitoner,

vs.

LAWRENCE JUSTICE, Respondent.

AFFIDAVIT

I, EARL B. GIBSON, being first duly sworn according to the law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees: 1. I am the respondent in the above-entitled case. 2. Because of my poverty I am unable to pay the costs of said cause. 3. I am unable to give security for the same. 4. I believe that I am entitled to the redress I seek in said case. 5. The nature of said cause is briefly stated as follows:

On June 22, 1973, I was sentenced to life imprisonment for first degree murder in the Superior Court of California, County of Marin. A petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 challenging that conviction was subsequently filed in the United States District Court for the Northern District of California. That petition was granted on appeal by the United States Court of Appeals for the Ninth Circuit on the ground that two instances of jury misconduct violated my constitutional right

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to confront and cross-examine the witnesses against me.

Earl B Gibson
EARL B. GIBSON

Duly witnessed and sworn to before me,
a Notary Public, this 5th day of March 1981

Karen Jo Koonan
Notary Public

OFFICIAL SEAL
KAREN JO KOONAN
NOTARY PUBLIC-CALIFORNIA
City and County of SAN FRANCISCO
My Commission Expires June 22, 1984

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-1339

THOMAS L. CLANON, Petitioner,

vs.

EARL B. GIBSON, Respondent.

GEORGE SUMNER, Petitioner,

vs.

LAWRENCE JUSTICE, Respondent.

AFFIDAVIT

I, DORON WEINBERG, being first duly sworn according to law depose and say, in support of respondents' motion for leave to proceed without being required to prepay costs or fees:

I am the attorney for respondent Earl B. Gibson, and have prepared the instant opposition to the petition for writ of certiorari on behalf of respondent Gibson, and also respondent Lawrence Justice. Respondent Justice is presently incarcerated in a county other than that in which I maintain my law offices, and on that basis I make the instant declaration in his behalf.

Respondent Lawrence Justice is presently incarcerated in the County Jail of Marin County, California, having been transferred thereto directly from the custody of the California Department of Corrections, in whose custody he has been held without interruption for more than ten years. As a result, Mr. Justice is without funds to prepay costs or fees in the instant matter, or to give security for the same. Both respondent Justice and respondent Gibson have

been found indigent by the Superior Court of Marin County, and have been assigned court-appointed counsel. They are represented in the instant proceedings on a pro bono basis, in recognition of the fact that they are without financial means.

I believe that the decision rendered by the United States Court of Appeals for the Ninth Circuit granting the petition for writ of habeas corpus herein was correct, and that respondents are accordingly entitled to the redress they seek. The nature of the proceedings is set forth in the accompanying affidavit of respondent Gibson.

I believe that the foregoing statements are true and correct, except as to those matters stated on information and belief, and as to those matters, I believe them to be true.

DORON WEINBERG

Duly witnessed and sworn to before me,
a Notary Public, this 2nd day of March, 1981.

Notary Public

OFFICIAL SEAL
KAREN JO KOONAN
NOTARY PUBLIC-CALIFORNIA
City and County of SAN FRANCISCO
My Commission Expires June 22, 1984